95-1084

No. _____

Supreme Court, U.S.
FILED
JAN 5 1996
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In The

Supreme Court of the United States

October Term, 1995

STATE OF ALASKA,

Petitioner,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, KATIE JOHN, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 29, 1995

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

94 pp

QUESTION PRESENTED

Whether, as decided by the Ninth Circuit, the term "public lands" in the Alaska National Interest Lands Conservation Act includes navigable waters in which the federal government possesses reserved water rights, so that the traditional state management of important fisheries in such waters may be preempted by federal officials, a determination directly contradicted by a decision of the Alaska Supreme Court?

LIST OF PARTIES BEFORE THE NINTH CIRCUIT

The parties to the proceedings below were the petitioners State of Alaska and Commissioner of the Alaska Department of Fish and Game Frank Rue, and respondents Secretary of the Interior Bruce Babbitt, Secretary of Agriculture Dan Glickman, Katie John, Doris Charles, the Mentasta Village Council, and the Alaska Federation of Natives.

Participating as amici curiae were the States of Arizona, California, Idaho, Montana, Nevada, and Oregon, Peninsula Marketing Association, Concerned Area M Fishermen, Aleutians East Borough, Shumagin Corporation, Qagan Tayagungin Tribal Council, Agdaagux Tribal Council, Nelson Lagoon Village Council, False Pass Tribal Council, the Native Village of Quinhagak, the Native Village of Goodnews Bay, the Association of Village Council Presidents, the Sitka Tribe of Alaska, the Alaska Inter-Tribal Council, RurAL CAP, Louie Smith, Annie Cleveland, the Native Village of Elim, Nome Eskimo Community, Kawerak, Inc., Manilaq Association, Lincoln Peratrovich, Shakan Kwaan, a Tlingit band, J.K. Samuel, and Taanta Kwaan, a Tlingit band.

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JURISDICTION

The Court of Appeals for the Ninth Circuit filed its decision in this case on April 20, 1995. The court denied the State of Alaska's petition for rehearing and rejected its suggestion for rehearing en banc on August 8, 1995. App. 55. A petition for a writ of certiorari was due on or before November 6, 1995, and Justice O'Connor extended this deadline to December 6, 1995. App. 56. The Ninth Circuit withdrew its opinion and filed a new opinion on December 19, 1995. This Court has jurisdiction to review on a writ of certiorari the Ninth Circuit's judgment under 28 U.S.C. § 1254.

RELEVANT STATUTES

16 USC § 3102:

Definitions. As used in this Act (except that in title IX and XIV the following terms shall have the same meaning as they have in the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.], and the Alaska Statehood Act)

(1) The term "land" means lands, waters, and interests therein.

(2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.

(3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except –

(A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law;

(B) land selections of a Native Corporation made under the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1601 et seq.] which have not been conveyed to a Native Corporation, unless any such selection is determined to be invalid or is relinquished; and

(C) lands referred to in section 19(b) of the Alaska Native Claims Settlement Act [43 U.S.C.A. § 1618(b)].

16 U.S.C. § 3114:

Preference for subsistence uses. Except as otherwise provided in this Act and other Federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in

order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through the appropriate limitations based on the application of the following criteria:

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.

STATEMENT OF THE CASE

This case presents the issue of geographic scope of the Alaska National Interest Lands Conservation Act ("ANILCA"), P.L. 96-487 (1980), specifically whether Congress intended ANILCA's application to "public lands" to include navigable waterways in Alaska that are subject to implied federal reserved water rights. No current issue involving Alaska and its resources is of greater significance to the State of Alaska ("the State"), because it determines the extent to which federal agencies will take over management of Alaska's fisheries, and to a lesser degree, its wildlife.

The State assumed management of the fish and wildlife on all lands in Alaska in 1960. Management control of Alaska's fisheries was one of the primary reasons Alaskans sought statehood in the 1950's, as Alaska's salmon stocks were decimated under the management of federal authorities. *See Metlakatla Indian Community v. Egan*, 362 P.2d 901 (Alaska 1961), *rev'd in part*, 369 U.S. 45 (1962).

In 1980, Congress passed ANILCA, a land conservation statute that includes a title granting a priority for hunting and fishing to rural residents, applicable to "public lands." 16 U.S.C. §§ 3111-3126. State law granted the same priority, and the State continued to manage fishing and hunting on all lands in Alaska until 1990. The Secretaries of Interior and Agriculture ("the Secretary") reassumed fish and wildlife management on public lands, however, in response to the Alaska Supreme Court decision in *McDowell v. State*, 785 P.2d 1 (Alaska 1989). In *McDowell*, the court found that Alaska's law giving rural residents a subsistence priority violated the state constitutional guarantees of equal access and prohibition of exclusive rights to fish and game. Alaska law now gives a priority to all subsistence users regardless of their residence. AS 16.05.258 (1992).

In response to *McDowell*, the Secretary determined that because the State constitutionally cannot limit a priority for subsistence hunting and fishing to rural residents, the United States must take over fish and wildlife management to administer the priority. The Secretary promulgated regulations for subsistence hunting and fishing on "public lands" in Alaska, creating the Federal Subsistence Board and giving it authority to adopt regulations for the day-to-day management of subsistence hunting and fishing. 57 Fed. Reg. 22,940 (May 29, 1992); 36 C.F.R. 242 (1995), 50 C.F.R. 100 (1994). The regulations define the "public lands" to which they apply as federally-owned lands and those waters running over federally-owned submerged lands. 36 C.F.R. 242.3(b), 50 C.F.R. 100.3(b).

Proceedings Below.

In 1990 Katie John, Doris Charles, and the Mentasta Village Council filed suit against the United States in the United States District Court for the District of Alaska, challenging the regulations as too restrictive and seeking application of the priority and federal management to all navigable waters.[1] *John v. United States*, D.Ct. No. 90-484-CV. They alleged that contrary to the Secretary's interpretation, Congress intended the subsistence priority granted by 16 U.S.C. § 3114, applicable to "public lands," to attach to all navigable waters in Alaska. They later named the State as a defendant, the Alaska Federation of Natives intervened, and all parties moved for partial summary judgment.

Counsel for the United States defended the regulations in briefing and at oral argument, arguing repeatedly that "public lands" as defined by ANILCA include only those lands and waters that the United States wholly or partially owns, and that the United States does not hold title to any interest in navigable waters. After three years of consistently advocating this interpretation, however, the United States suddenly changed its position. At a second oral argument on the same cross-motions for summary judgment, counsel for the United States announced that the Secretary now agrees that "public lands" include waters subject to a federal reserved water right. A federal reserved water right arises when the United States withdraws its lands from the public domain and reserves it

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[1] The district court had jurisdiction pursuant to 16 U.S.C. 3117 and 28 U.S.C. 1331, 1346.

for a federal purpose, and by implication reserves appurtenant waters then unappropriated. *Cappaert v. United States*, 426 U.S. 128, 138 (1976).

In March 1994 the district court ruled that because the United States holds title to the navigational servitude, all navigable waters in Alaska constitute "public lands" subject to federal fisheries management. *Katie John v. United States*, Nos. A90-0484-CV, A92-0264-CV (consolidated) (HRH), 1994 WL 487830 (D. Alaska 1994). The court stayed its decision pending appeal. The State and the United States filed petitions for review, which the Ninth Circuit granted pursuant to 28 U.S.C. § 1292(b) on May 17, 1994. C.A. Nos. 94-80141, 94-80142. Both the State and the United States appealed the district court's decision that the navigational servitude renders navigable waters "public lands." C.A. Nos. 94-35480, 94-35481.

The Ninth Circuit reversed the district court, finding that the United States does not hold title to the navigational servitude, but that "public lands" include all navigable waters in which the United States implicitly has reserved a water right. App. 1. The Court did not discuss how it reached this result based on the statute's definition of "public lands," which is "lands, waters, and interests therein, title to which is in the United States." App. 7 (combining the definitions in 16 U.S.C. § 3102(1)-(3)).[2] The court simply found that Congress must have meant

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[2] ANILCA defines "public lands" as follows:

As used in this Act . . .

1) The term "lands" means lands, water, and interests therein.

to include navigable waters in the definition of "public lands," and deferred to the federal agencies' recently-adopted position that Congress granted the Secretaries authority to manage fisheries where the United States has a federal reserved water right for in-stream flows.

The Ninth Circuit denied the State's petition for rehearing and rejected its suggestion for rehearing en banc on August 8, 1995. On August 9, the State submitted the Alaska Supreme Court's decision in *Totemoff v. State*, ___ P.2d ___, 1995 WL 479510 (1995) (corrected opinion at 1995 WL 619365 (Alaska 1995)) to the Ninth Circuit as supplemental authority. On August 10, 1995, the Ninth Circuit ordered the mandate withheld pending further order. On December 19, 1995, the Ninth Circuit withdrew the opinion and issued another in its place. ___ F.3d ___, 1995 WL 749795. Judge Cynthia Holcomb Hall, who initially had joined the majority opinion, changed her position and wrote a dissent. She wrote that as judges, the Ninth Circuit panel is neither qualified to nor capable of deciding whether Alaska or the United States has control over Alaska's navigable waters. She was "compelled to conclude" that the United States has no interest in Alaska's navigable waters, and that therefore these waters are not "public lands" under ANILCA. App. 23.

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2) The term "Federal lands" means lands the title to which is in the United States after December 2, 1980.

3) The term "public lands" means land situated in Alaska which, after December 2, 1980 are Federal lands [with certain exceptions]. 16 U.S.C. 3102(1)-(3) (citations omitted).

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit and the Alaska Supreme Court have directly conflicting decisions interpreting federal law that will create a jurisdictional crisis between the State and the United States if not resolved by this Court.

The Ninth Circuit in *State v. Babbitt* and the Alaska Supreme Court in *Totemoff v. State* have issued directly conflicting opinions construing the geographic scope of "public lands" as defined in ANILCA, 16 U.S.C. § 3102. *Babbitt* holds that public lands include navigable waters subject to a federal reserved water right; *Totemoff* holds that they do not. This difference in interpretation creates a jurisdictional conflict as to whether the United States or the State has regulatory authority over the fish in many waterways in Alaska. A federal takeover of Alaska's fisheries while state residents continue to follow and state courts continue to enforce state regulations would harm both the citizens of Alaska caught between clashing authorities and the fish stocks whose sustained yield depends upon harvest levels determined by the management authority.

In *Totemoff v. State*, ___ P.2d ___, 1995 WL 619365 (Alaska 1995), the Alaska Supreme Court decided the same issue faced by the Ninth Circuit in this case. App. 25. In *Totemoff*, the State prosecuted a rural resident for shooting a deer with the aid of a spotlight, and the defendant raised as a defense the claim that spotlighting deer is a protected activity under ANILCA's subsistence priority. 1995 WL 619365 at *1. The defendant was in his boat on navigable waters when he shot the deer, so his

defense required the Alaska Supreme Court to determine whether those waters constitute "public lands" under ANILCA. The court found that "public lands" do not include navigable waters by virtue of the federal reserved water right, contrary to the Ninth Circuit decision in this case. *Id.* at *8.

The geographic scope of "public lands" is significant for two reasons: (1) ANILCA's subsistence priority for rural residents applies only to hunting and fishing on public lands, 16 U.S.C. § 3114, and (2) the federal agencies have deemed it necessary to assume management authority over fish and wildlife on public lands because the State cannot grant a preference for hunting and fishing based solely on residency under Alaska's constitution. Therefore, on public lands rural residents have federal rights that do not exist on state and private lands, and the Secretary will issue regulations to supersede the State's management authority.

This conflict over the geographic scope of ANILCA puts the State in an untenable position. Unless this Court resolves the geographical conflict, state officials will be bound to follow two irreconcilable decisions, each interpreting the geographic scope of "public lands" differently. How can the State comply with both decisions? *Totemoff* holds that state regulations apply to navigable waters as a matter of federal law, and therefore that the State is responsible for managing the fisheries, promulgating regulations applicable to all residents determining permissible harvest levels, seasons, and methods, and enforcing its laws in its navigable waters. At the same time, the State is bound by the *Babbitt* decision that holds that the United States must assume management

authority and promulgate regulations governing harvest levels, seasons, and methods in many waterways. These are irreconcilable decisions. The State either must manage the fisheries for subsistence uses or defer to federal management; it cannot do both.[3]

Two managers with independently endorsed regulatory control of fisheries would be harmful to the public. Alaskans would be required to follow two sets of regulations purporting to govern hunting and fishing on navigable waters, and state and federal courts would be bound to follow the respective decisions interpreting the scope of "public lands" under ANILCA. Depending on the differences between the state and federal regulations, Alaskans could face the dilemma of being subject to prosecution by one authority for following the laws of the other. Although the Supremacy Clause dictates generally that federal law preempts directly conflicting state law, it is inapplicable here because *Totemoff* is based on the Alaska Supreme Court's interpretation of federal law. *See, e.g., Lockhart v. Fretwell*, 113 S.Ct. 838, 846 (1993) (Thomas, J., concurring) ("The Supremacy Clause demands that

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[3] Deferring to federal management means that the State waits while regional councils propose to the Federal Subsistence Board the desired bag limits, seasons, and methods for subsistence fishing for each waterway within its jurisdiction, and while the Federal Subsistence Board determines whether and how to implement the proposals and promulgates regulations. The State then must estimate the number of fish that will be harvested under the federal subsistence regulations, determine how many fish might be left for commercial, sport, and urban subsistence users, then allocate the remainder among these users by setting their bag limits, seasons, and methods.

state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.") Thus, if a rural resident violates a state fishing regulation and raises as a defense that ANILCA's priority entitles him or her to engage in that activity, an Alaska court presumably would apply *Totemoff* and find the priority inapplicable to navigable waters.[4]

Perhaps even more devastating would be the effect on the fish of two regulatory entities that each believes it has responsibility to manage for subsistence uses in the affected waters. For the State, fisheries management involves complex analyses based on numerous factors, with the goal of permitting a harvest level that will provide a priority to subsistence fishers and a fair and reasonable opportunity to other users, and that will assure sustained yield of the stocks. *See* AS 16.05.258(b)(1), 16.05.251(d). To accomplish this, the State monitors such factors as population abundance, numbers of spawners, disease, food supply, habitat, extreme weather conditions, predators, and birth and death rates. *See generally* AS 16.05.251. The State must evaluate the

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[4] Such conflicts exist already in hunting regulations. For example, state regulations prohibit hunting from boats in game unit 4, but federal subsistence regulations permit shooting deer from boats in game unit 4. *Compare* 5 AAC 92.085(9) *with* 36 C.F.R. 242.25(k)(4)(iii) *and* 50 C.F.R. 100.25(k)(4)(iii).

health and stability of the population, determine causes of population unhealthiness or decline, collect harvest reports from the previous season or fishing period, then consider these factors in deciding how much of the population can be harvested, when it can be taken, and what type of fish can be harvested (*e.g.*, species, sex, condition, size). Sometimes these decisions must be made quite quickly.

For example, the State manages the Prince William Sound herring sac roe fishery entirely by Emergency Order. *See* 5 AAC 27.310. The health of the stock depends on accurate information and immediate decisions. The State collects stock abundance estimates and information on fish roe quality daily, and compiles catch statistics within two to six hours following a commercial fishery opening. Advance notice prior to commercial fishing openings can be as little as one hour and individual fishery openings may be as short as 15 minutes. The entire fishery may be over following a single such opening, depending on the population and harvest data the State collects. During 1995, the State determined before the season that the stock was not healthy enough to support a commercial harvest and decided not to open the fishery at all. App. 64.

Two separate managers making these determinations are likely to make conflicting harvest determinations based on separate harvest records, separate habitat-maintenance decisions, different means and methods of fishing and season lengths and times, and different predictions or analyses of population fluctuations. Effective management of fish and wildlife with two regulators that understand and accept the boundaries of their

respective authority is difficult; effective management of fish and wildlife with two regulators each asserting exclusive jurisdiction over the same waters for a particular use is simply impossible.

The potential geographical extent of this jurisdictional conflict should not be underestimated. Although the Ninth Circuit decision purports to require the Secretary to include only navigable waters in which the United States holds an implicit reserved water right, in fact usurpation of the State's management authority could be almost complete. Rural residents in this case and other litigation have contended that the Secretary must regulate fish and wildlife *off* public lands in order to afford the subsistence priority *on* public lands. *See* First Amended Complaint for Declaratory and Injunctive Relief at 15, App. 58. They reason that for migratory animals and anadromous fish (such as salmon), harvests occurring miles off public lands will affect harvest opportunities on public lands. This would deprive the State of primary management of Alaska's salmon fisheries in most inland waterways and in the ocean.

II.

The Ninth Circuit decision deprives Alaska of management authority over its fisheries without a clear indication that Congress considered or intended this result.

The Ninth Circuit's decision in this case will deprive the State of control of its fisheries in many or most of its waters, a result that Congress clearly did not intend in enacting 16 U.S.C. § 3102. This consequence is of critical importance to the State because acquiring management of

Alaska's fisheries was a primary reason Alaskans sought statehood and remains fundamental to Alaska's identity as a state. Before statehood, Alaska's salmon stocks were decimated under the management of federal authorities. *See Metlakatla Indian Community*, 362 P.2d 901. In 1950 Alaska's Territorial Governor Ernest Gruening testified to the Senate Committee on Interior and Insular Affairs that Alaskans considered statehood to be inextricably tied to control of the territory's fisheries. *Hearings on H.R. 331 and S.2036 Before the Senate Comm. on Interior and Insular Affairs*, 81st Cong., 2d Sess. 486 (April 24-29, 1950).

> We all feel in Alaska that it is inconceivable to think of a State being created without control of [fisheries]. Alaskans feel that the very existence and perpetuation of that resource, which has so often been jeopardized in the past in no small degree because of inadequate enforcement due to insufficient Federal appropriations, depends on local control. The people of Alaska all feel, and this is said without any criticism, that they could do a better job with the conservation of fisheries than has been done through the years.

Id.

Under State management, salmon stocks in Alaska have rebuilt to record levels. *See* Ron Regnart, Comparative History of Federal and State Management of Fisheries in Alaska at 36-37 (June 1993), Exhibit to Docket 141, *Katie John, et al. v. United States of America, et al.*, No. A90-484-Civ (HRH), App. 62. The seafood industry is Alaska's largest private sector employer, and is second only to oil and gas in natural resource revenue contribution to the State treasury. *Id.* Alaska's commercial fishery supports the highest level of production in the United

States, about one-half of the nation's total. *Id.* State management of Alaska's fisheries is a defining element of state sovereignty to Alaskans. Alaska should not have to succumb to federal control of one of its most valuable natural resources unless Congress unmistakably expresses this intention.[5]

The Ninth Circuit's strained attempt to judicially include navigable waters in 16 U.S.C. § 3102 disregards the clear statement doctrine, under which a court should not divest a state of traditional powers unless Congress has made that intent manifestly apparent. The Supreme Court will interpret a law to affect all activities within Congress' control under its commerce power only if the statutory language or legislative history constitutes a clear statement that Congress intended to exercise this power in full. Laurence H. Tribe, *American Constitutional Law*, § 5-8 at 316 (2d ed. 1988). As Justice Frankfurter stated, federal statutes impinging upon important state

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[5] ANILCA's legislative history indicates that Congress never considered the possibility that minor interests of the United States in lands or waters might render them "public lands" subject to the subsistence priority. Alaska state law already granted a priority for all lands in Alaska when ANILCA was enacted, so Congress did not concern itself with the implications of its definition of "public lands" but merely defined them as "lands" owned by the United States, *i.e.* "lands, waters, and interests therein," which is boilerplate language it uses routinely in statutes in title 16 establishing conservation areas and parks. *See, e.g.*, 16 U.S.C. §§ 90b, 110c(c)(3), 121, 228b(a), 230a(b), 230g(a), 272(a), 273, 398d, 410j, 410o, 410p, 410bb(b)(1), 410ff-1(a), 410gg, 410gg-1, 410ii-3(a), 410jj-3(c), 410mm-2(b), 410qq-2(a), 410rr-2, 410rr-7(c).

interests "cannot . . . be construed without regard to the implications of our dual system of government. . . . "

> [W]hen the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.

Felix Frankfurter, *Some Reflections of the Reading of Statutes*, 47 Colum. L. Rev. 527, 540 (1947), quoted in part in *BFP v. Resolution Trust Corporation*, 114 S. Ct. 1757, 1764 (1994).

The Ninth Circuit's interpretation of public lands constitutes a contrived, enigmatic reading of Congress' attempt to set definite geographical boundaries. Congress did not state a clear intent to include navigable waters in defining "public lands" as "lands, waters, and interests therein, title to which is in the United States." 16 U.S.C. § 3102(1)-(3). To reach the conclusion that waters subject to a federal reserved water right constitute "public lands," the Ninth Circuit disregarded the actual language of the provision and ruled as though Congress had defined "public lands" as "lands and waters in which the United States has any interest." Thus, it found that the existence of a federal reserved water right to prevent excessive appropriation in the streamflow of a river would convert the entire river flowing through the federal reservation into "public lands." When a court precedes its statutory interpretation with significant

substantive redrafting, the interpretation by definition does not reflect a clear statement of Congressional intent.

The decision renders meaningless language that Congress intended to limit the legislation's effect. Congress intended the definition of "public lands" to designate a limited, definite geographic area to which federal regulation would apply. If "public lands" are lands and waters in which the United States has any interest, the geographic area is impossible to determine without comprehensive analyses of all interests in every parcel of land and waterway and legal determinations of what level of federal interest converts lands and waters to "public lands." This Court rejected a similarly expansive interpretation of a provision in the Employee Retirement Income Security Act that marks for preemption "all state laws insofar as they relate to any employee benefit plan," because it rendered words of limitation completely without limitation. *See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S.Ct. 1671, 1676-77 (1995) (citations omitted). Similarly, interpreting "public lands" to include all lands and waters in which the United States has any interest effectively assures that "preemption [will] never run its course." *Id.* If a right to prevent over-appropriation of water renders a navigable river "public lands," then no principled reason can exclude from this characterization lands or waters subject to federal easements,[6] Internal Revenue Service liens, and

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[6] Under 43 U.S.C. 945, all patents for federal land after 1890 west of the 100th meridian are conveyed subject to a reserved federal right-of-way for construction of ditches and canals; this includes nearly all state and private lands in Alaska.

state-permitted water rights. Indeed, the state must deny non-reserved water right permits to the United States if it finds their issuance not to be in the public interest, AS 46.15.080(a)(4), and losing state management of the fisheries in a river may be considered contrary to the interests of Alaskans.

The court's interpretation of "public lands" is anomalous not only because it includes waters far beyond the federal lands Congress intended, but also because its principled application *excludes* vast federal lands and all navigable waters. If all lands and waters in which the United States has any interest are "public lands," then all lands or waters in which the state has any interest granted or confirmed by federal law are excepted. *See* 16 U.S.C. § 3102(3)(A) (exception to the definition of public lands for "[lands, waters, and interests therein] confirmed . . . or granted to the Territory of Alaska or the State under . . . Federal law"). For example, as the Alaska Supreme Court noted in *Totemoff*, Congress granted the State the natural resources in Alaska's navigable waters, and therefore all navigable waters ought to be excluded from ANILCA's definition of "public lands." 1995 WL 619365 at *9; *see* Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 (1953). Thus, although under *Babbitt* a water right renders certain navigable waters "public lands," under the same principle the state's federally-confirmed interest as public trustee of the resources in navigable waters excepts them from that definition. Similarly, federal lands in which the state has an interest are excepted from "public lands." This includes federal lands over which the state has access rights to inholdings. *See, e.g.*, 16 U.S.C. § 3170; 16 U.S.C. § 3210.

The extreme awkwardness of using a reserved water right to define a geographic area also indicates the Ninth Circuit's indifference to the clear statement requirement, because Congress would not choose a definition for "public lands" so difficult to apply. The Secretary's ability to exert control over lands or waters in which the United States holds an interest requires that the interest be of a nature that adheres to a definite area. The United States' interest in a reserved water right in this case constitutes the right to prevent others from appropriating more water than necessary to sustain sufficient in-stream flows for fish habitat. Only this right constitutes "public lands" under 16 U.S.C. § 3102,[7] and these "public lands" are intangible and non-possessory. Designating this right as "public lands" does not give the Secretary fish and wildlife management authority in any definite area, and thus such a designation is meaningless.

Even if the waters subject to the right rather than the right itself constituted "public lands," the waters subject to the right cannot define a geographical area. To divide the waters in any given water column between "public lands," the minimal amount of the water reserved for fish passage, and the remaining waters is impossible. The federal reserved water right applies only where Congress implicitly reserved water and only to the extent necessary to fulfill the primary purpose of the reservation. *See Cappaert*, 426 U.S. at 141. Further, quantification of the

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[7] Under the plain language of 16 U.S.C. § 3102, a federal interest in lands or waters might constitute "public lands," but the existence of the interest does not convert vast areas of land and waters into "public lands."

minimum amount of water to preserve in-stream flows for fish is a complex undertaking requiring water and fisheries specialists.

Despite the tremendous strain required to find that 16 U.S.C. § 3102 includes waters subject to a federal reserved water right, the Ninth Circuit found that "ANILCA's language and legislative history indicate clearly that Congress spoke to the precise issue of whether some navigable waters may be public lands." App. 8. The court's explanation for this assertion further demonstrates its disregard for the clear statement necessary to find that Congress carefully considered and fully intended to assume fisheries management of Alaska's navigable waters. The court reasoned that ANILCA's language and legislative history indicate that subsistence uses include subsistence fishing, and subsistence fishing traditionally has occurred in navigable waters; therefore Congress must have intended that "public lands" include some navigable waters. App. 8.

This does not demonstrate that Congress spoke to the precise issue. The court's conclusion is invalid as a matter of statutory interpretation because the subsistence priority applies to "public lands," not to traditional subsistence fishing. Inclusion of navigable waters within the "public lands" definition certainly can be rationalized as providing for subsistence fishing, but Congress plainly intended the priority to extend to "public lands," not to "areas providing for subsistence hunting and fishing." Further, subsistence fishing traditionally has occurred in non-navigable waters as well, and so a definition limited to waters in which the United States owns the submerged

lands would effectuate the priority even if it does not apply to most navigable waters.[8] The rationale that Congress intended to include all areas traditionally used for subsistence hunting and fishing mandates inclusion of many state and private lands as "public lands," clearly not what Congress intended.

The Ninth Circuit decision violates the clear statement doctrine also because it defers to an agency interpretation developed during litigation that is directly contrary to its earlier position. Finding ANILCA's text and legislative history "unhelpful" in divining which navigable waters are public lands, the court deferred to the United States' interpretation of the term with little analysis. App. 8-9. Deference was unwarranted in this case because the United States adopted its interpretation during the litigation, after three years of vehemently asserting the contrary position. The United States itself did not suggest that its position was entitled to deference in this case. When a court simply accepts an interpretation of the extent of federal usurpation of the state's traditional police power that the United States expressly and actively repudiated for three years, it has not found that Congress has made a clear statement of the extent of the preemption.

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[8] The federal regulations for subsistence fishing apply in a significant number of navigable waters as well, where the United States claims title to the submerged lands. *See* 36 C.F.R. 242.3(b) (1992), 50 C.F.R. 100.3(b) (1992). The United States claims title to most of the land withdrawn before statehood, which includes 25% of Alaska.

CONCLUSION

The conflict in decisions between the Ninth Circuit and the Alaska Supreme Court will cause jurisdictional chaos in fisheries management in Alaska. Further, the Ninth Circuit decision legislates a federal takeover of fisheries on a scale and in a manner that Congress never considered. For these reasons, this Court should grant this petition for certiorari.

DATED this 29th day of December, 1995.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF ALASKA, *Plaintiff-Appellant,* v. BRUCE BABBITT, Secretary of the Interior, et al., *Defendants-Appellees.*	No. 94-35480 D.C. No. CV-92-0264-HRH
KATIE JOHN, et al., *Plaintiffs-Appellees.* v. UNITED STATES OF AMERICA, et al., *Defendants-Appellants.*	No. 94-35481 D.C. No. CV-90-0484-HRH ORDER AND OPINION

Appeals from the United States District Court
for the District of Alaska
H. Russel Holland, District Judge, Presiding

Argued and Submitted
February 8, 1995 – Seattle, Washington

Opinion Filed April 20, 1995

Opinion Withdrawn December 19, 1995

Filed December 19, 1995

Before: Eugene A. Wright, Cynthia Holcomb Hall and Charles Wiggins, Circuit Judges.

Opinion by Judge Wright; Dissent by Judge Hall

These appeals arise from the efforts of Katie John, Doris Charles and the other upper Ahtna Athabaskan Indians of Mentasta Village to continue subsistence fishing at Batzulnetas as they and their ancestors have done since time immemorial.[1] The fishery at Batzulnetas lies near the confluence of Tanada Creek and the Copper River and within Wrangell-St. Elias National Park. They also involve the claim by the state of Alaska that the Secretaries of the Interior and Agriculture, on behalf of the federal government, are attempting to exercise too much control over fish and wildlife management within the state.

The Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3101 et seq., requires that subsistence fishing and hunting be given a priority over other uses of fish and wildlife on "public lands." The sole issue remaining in this appeal concerns the meaning of the definition of public lands in § 102 of ANILCA. 16 U.S.C.

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[1] The following amici curiae also seek to continue subsistence fishing in particular navigable waters: the Peratrovich Plaintiffs whose ancestors fished in marine waters in the Alexander Archipelago and within the Tongass National Forest; the Tlingit, Haida and Tsimshian Indians of the Sitka Tribe whose ancestors also fished in marine waters; the Yup'ik Eskimos of the Villages of Quinhagak and Goodnews Bay whose ancestors fished at the mouths of the Kanektok and Goodnews Rivers; and the Native Alaskans of the Village of Elim and the Nome Eskimo Community whose ancestors fished along the coast of the Seward Peninsula in northern Norton Sound.

§ 3102.[2] Specifically, the parties dispute whether navigable waters fall within the statutory definition of public lands and are thus subject to federal management to implement ANILCA's subsistence priority.[3]

The district court adopted a highly expansive definition of public lands, holding that the subsistence priority applies to all Alaskan waters subject to the federal navigational servitude. We disagree. Instead, we hold that the subsistence priority applies to navigable waters in which the United States has reserved water rights. We hold also that the federal agencies that administer the subsistence priority are responsible for identifying those waters. We therefore reverse and remand to the district court for further proceedings consistent with this opinion.

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[2] Another issue originally raised in this appeal was whether Title VIII of ANILCA authorizes the federal government to manage subsistence fishing and hunting on public lands in the absence of Alaska laws implementing the subsistence priority. The district court held that ANILCA does, in fact, authorize the appropriate federal agencies to promulgate regulations if the state does not or cannot do so. After briefing was completed in this court, but before oral argument, the parties, including the state of Alaska, stipulated to the dismissal with prejudice of that issue. We accepted the stipulation.

The Alaska Legislature, angry with the Governor's directive to the Attorney General to stipulate to the dismissal, filed an emergency motion for intervention and, in the alternative, for substitution, or for stay. We denied its motion, concluding that the Legislature was not empowered under state law to intervene in the appeal.

In light of the dismissal with prejudice of that issue, the district court's holding on this issue stands.

[3] As the parties do not dispute whether nonnavigable waters are public lands, we do not address that issue.

I. BACKGROUND

In 1958, Congress preserved aboriginal fishing rights in the Statehood Act. Act of July 7, 1958, Pub.L. 85-508, § 4, 72 Stat. 339. But in 1960, after assuming responsibility for fish and wildlife management, the state closed the fishery at Batzulnetas and other traditional subsistence fisheries. In 1971, Congress extinguished aboriginal fishing rights. 43 U.S.C. § 1603(b).

Congress expected that the state and the federal agencies would protect subsistence hunting and fishing. 1971 U.S.C.C.A.N. 2192, 2247, 2250. In 1980, frustrated with their failure to do so, Congress enacted ANILCA. Title VIII of ANILCA required that rural Alaska residents be accorded a priority for subsistence hunting and fishing on public lands. 16 U.S.C. §§ 3113, 3114. Pursuant to § 805(d) of ANILCA, 16 U.S.C. § 3115(d), Congress gave the state authority to implement the rural subsistence preference by enacting laws of general applicability consistent with ANILCA's operative provisions. In anticipation of ANILCA's passage, the state enacted laws consistent with Title VIII which gave rural residents a subsistence priority. In 1982, after Congress enacted ANILCA, the Secretary of the Interior certified the state to manage subsistence hunting and fishing on public lands.

Congress could not have anticipated the next chain of events. In 1989, the Alaska Supreme Court struck down the state act granting the rural subsistence preference as contrary to the Alaska state constitution. *McDowell v. Alaska*, 785 P.2d 1 (Alaska 1989). It stayed its decision to

give the legislature an opportunity to amend the constitution or otherwise bring its program into compliance with ANILCA. The legislature, however, failed to act during either its regular or special session.

In 1990, the federal government withdrew Alaska's certification and took over implementation of Title VIII. The Secretary of the Interior, on behalf of all concerned federal agencies, published temporary subsistence management regulations that adopted a very narrow definition of public lands, explaining that "navigable waters generally are not included within the definition of public lands." 55 Fed.Reg. 27,114, at 27,115 (June 29, 1990). The final regulations did not differ significantly. *See* 57 Fed.Reg. 22,940, at 22,942 (May 29, 1992).

Katie John and the state brought separate actions against the federal agencies; Katie John challenged the regulations that provided that public lands excluded navigable waters and the state challenged the federal government's authority to regulate in this area at all. The district court ordered these actions consolidated and that other actions raising similar issues be jointly managed.[4] After consulting with counsel for the parties in the jointly managed cases, the district court decided to address the

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[4] The jointly managed cases include: *Kluti Kaah Native Village of Copper Ctr. v. Alaska*, No. A90-0004-CV, *Fish & Game Fund v. Alaska Bd. of Fisheries*, No. A92-0443-CV, *Peratrovich v. United States*, No. A92-0734-CV, *Native Village of Stevens v. McVee*, No. A92-0567-CV, and *Native Village of Quinhagak v. United States*, No. A93-0023-CV.

fundamental issue of whether navigable waters are public lands before resolving other issues.[5]

Katie John argued that public lands include virtually all navigable waters, by virtue of the federal navigational servitude. The state contended that public lands exclude navigable waters. Prior to oral argument before the district court, the federal agencies agreed with the state. But at oral argument, those agencies modified their position, arguing that public lands include those navigable waters in which the federal government has an interest under the reserved water rights doctrine.

On cross-motions for summary judgment, the district court concluded that public lands include all navigable waters encompassed by the navigational servitude. Subsequently, the district court stayed its decision and certified for interlocutory appeal the issue of whether public lands include navigable waters.[6] Both the state and the federal agencies appeal.

II. ANALYSIS

We consider two questions when we review an agency's construction of a statute that it administers.

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[5] The district court also characterized as fundamental the issue of whether ANILCA authorizes federal agencies to manage subsistence fishing and hunting on public lands in the absence of consistent Alaska laws. As discussed *supra* at note 2, that issue is not before us.

[6] Similarly, it certified the issue of whether ANILCA authorizes federal agencies to manage subsistence fishing and hunting on public lands in the absence of consistent Alaska laws for interlocutory appeal. *But see supra* at note 2.

Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). First, we consider "whether Congress 'has directly spoken to the precise question at issue' either in the statute itself or in the legislative history." *Railway Labor Executives' Ass'n v. ICC*, 784 F.2d 959, 963 (9th Cir.1986) (quoting *Chevron*, 467 U.S. at 842, 104 S.Ct. at 2781). Second, if Congress has not directly spoken to that precise question, we consider "whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. at 2782.

Under ANILCA, "the term 'public lands' means land situated in Alaska which . . . are Federal lands." 16 U.S.C. § 3102(3). "The term 'Federal land' means lands the title to which is in the United States." 16 U.S.C. § 3102(2). And "[t]he term 'land' means lands, waters, and interests therein." 16 U.S.C. § 3102(1). In other words, public lands are lands, waters, and interests therein, the title to which is in the United States. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 n. 15, 107 S.Ct. 1396, 1405-06, n. 15, 94 L.Ed.2d 542 (1987).

As noted above, the parties dispute whether navigable waters are public lands. At one extreme, the state maintains that ANILCA's definition of public lands excludes all navigable waters because the federal government does not hold title to them by virtue of the navigational servitude or the reserved water rights doctrine. At the other extreme are Katie John and amici curiae Peratrovich Plaintiffs who argue that all navigable waters are public lands. Katie John says this is so because the navigational servitude defines the scope of public lands. The Peratrovich Plaintiffs say this is so because, in ANILCA,

Congress expressed its intent to exercise its Commerce Clause powers to regulate subsistence fishing in navigable waters.[7] In the middle are federal agencies contending that public lands include certain navigable waters, defined by the reserved water rights doctrine.[8]

ANILCA's language and legislative history indicate clearly that Congress spoke to the precise question of whether *some* navigable waters may be public lands. They clearly indicate that subsistence uses include subsistence fishing. *See, e.g.*, 16 U.S.C. § 3113. And subsistence fishing has traditionally taken place in navigable waters. Thus, we have no doubt that Congress intended that public lands include at least some navigable waters.[9]

Unfortunately, ANILCA's language and legislative history do not give us the clear direction necessary to find that Congress spoke to the precise question of *which* navigable waters are public lands. ANILCA itself refers only to "lands, waters, and interests therein, the title to which is in the United States." It makes no reference to

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[7] In addition to their Commerce Clause argument, amici curiae Peratrovich Plaintiffs join in Katie John's navigational servitude argument.

[8] In addition to their navigational servitude and Commerce Clause arguments, Katie John and amici curiae Peratrovich Plaintiffs alternatively contend that the reserved water rights doctrine defines the scope of public lands.

[9] Our interpretation of the term public lands in this case will not allow the United States to usurp state power over navigable waters elsewhere. ANILCA applies only to Alaska and our interpretation of its definition of public lands is necessary to give meaning to its purpose of providing an opportunity for a subsistence way of life.

navigable waters. The legislative history is also unhelpful, containing only a single reference to navigable waters. *See* 126 Cong.Rec. 20278-80 (Nov. 12, 1980) (statement of Rep. Udall). Lacking clear direction, we must decide whether the federal agencies' conclusion that public lands include some navigable waters under the reserved water rights doctrine is based on a permissible construction of the statute.

A. Navigational Servitude

The navigational servitude describes the paramount interest of the United States in navigation and the navigable waters of the nation. *United States v. Certain Parcels of Land*, 666 F.2d 1236, 1238 (9th Cir.1982). It derives from the Commerce Clause. *Kaiser Aetna v. United States*, 444 U.S. 164, 177, 100 S.Ct. 383, 391-92, 62 L.Ed.2d 332 (1979). It is "a concept of power, not of property." *Certain Parcels*, 666 F.2d at 1238 (citing *United States v. Twin City Power Co.*, 350 U.S. 222, 224-25, 76 S.Ct. 259, 260-61, 100 L.Ed. 240 (1956)).

We have held that the navigational servitude is not "public land" within the meaning of ANILCA because the United States does not hold title to it. *City of Angoon v. Hodel*, 803 F.2d 1016, 1027 n. 6 (9th Cir.1986), *cert. denied*, 484 U.S. 870, 108 S.Ct. 197, 98 L.Ed.2d 148 (1987). Contrary to the district court's opinion, the Supreme Court has not limited that holding. In *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 107 S.Ct. 1396, 94 L.Ed.2d 542 (1987), the Court rejected the assertion that the Outer Continental Shelf (OCS) is not "Federal land" because the United States does not hold title to it. *Id.* at 548 n. 15, 107

S.Ct. at 1406 n. 15. The Court explained in dictum that, while the United States may not hold "title" to the OCS, it was hesitant to conclude that the United States did not have "title" to "any interests therein." *Id.* But its dictum indicates only that, while the United States may not hold title to land, it may hold title to interests (e.g., mineral rights) in that land.

For this reason, we reject the argument that the navigational servitude is an "interest . . . the title to which is in the United States," such that all navigable waters are public lands within the meaning of ANILCA.

B. Commerce Clause

Neither the language nor the legislative history of ANILCA suggests that Congress intended to exercise its Commerce Clause powers over submerged lands and navigable Alaska waters. Although Congress explicitly invoked its authority under the Commerce Clause to protect and provide the opportunity for continued subsistence uses on the public lands, *see* 16 U.S.C. § 3111(4), its invocation of that authority is also consistent with an implicit reservation of waters under the reserved water rights doctrine.

Congressman Morris Udall inserted a statement in the Congressional Record that ANILCA's definition of public lands included all navigable waters throughout Alaska. *See* 126 Cong.Rec. 29260, 20278-80 (Nov. 12, 1980) (statement of Rep. Udall). He did so, however, after the Senate had passed ANILCA, after the House had finished debating it, and shortly before the House voted on it. His views deserve little weight. *See NLRB v. Fruit & Vegetable*

Packers & Warehouseman, 377 U.S. 58, 66, 84 S.Ct. 1063, 1068, 12 L.Ed.2d 129 (1964) ("these statements could represent only the personal views of these legislators, since [they] were inserted in the Congressional Record after passage of the Act").

We reject the argument that Congress expressed its intent to exercise its Commerce Clause powers to regulate subsistence fishing in all Alaskan navigable waters.

C. Reserved Water Rights

Under the reserved water rights doctrine, when the United States withdraws its lands from the public domain and reserves them for a federal purpose, the United States implicitly reserves appurtenant waters then unappropriated to the extent needed to accomplish the purpose of the reservation. *Cappaert v. United States*, 426 U.S. 128, 138, 96 S.Ct. 2062, 2069, 48 L.Ed.2d 523 (1976). The United States may reserve "only that amount of water necessary to fulfill the purpose of the reservation." *Id.* at 141, 96 S.Ct. at 2071. The United States' authority to reserve unappropriated waters derives from the Commerce Clause and the Property Clause. *Id.* at 138, 96 S.Ct. at 2069.

In determining whether the reserved water rights doctrine applies, we must determine whether the United States intended to reserve unappropriated waters. *Id.* at 139, 96 S.Ct. at 2069-70. Intent is inferred if those waters are necessary to accomplish the purposes for which the land was reserved. *Id.*; *United States v. New Mexico*, 438 U.S. 696, 702, 98 S.Ct. 3012, 3015, 57 L.Ed.2d 1052 (1978). It follows that courts must conclude that "without the

water the purposes of the reservation would be entirely defeated." *Id.* at 700, 98 S.Ct. at 3014.

The United States has reserved vast parcels of land in Alaska for federal purposes through a myriad of statutes.[10] In doing so, it has also implicitly reserved appurtenant waters, including appurtenant navigable waters, to the extent needed to accomplish the purposes of the reservations. By virtue of its reserved water rights, the United States has interests in some navigable waters. Consequently, public lands subject to subsistence management under ANILCA include certain navigable waters.

For these reasons, we hold to be reasonable the federal agencies' conclusion that the definition of public lands includes those navigable waters in which the United States has an interest by virtue of the reserved water rights doctrine. We also hold that the federal agencies that administer the subsistence priority are responsible for identifying those waters.

III. CONCLUSION

We recognize that our holding may be inherently unsatisfactory. By holding that public lands include some specific navigable waters as a result of reserved water

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[10] These statutes include, but are not limited to, acts reserving land for national parks, forests and wildlife preserves, the Statehood Act, the Alaska Native Claims Settlement Act and ANILCA itself.

rights, we impose an extraordinary administrative burden on federal agencies. We accept a complicated regulatory scheme requiring federal and state management of navigable waters. Let us hope that the federal agencies will determine promptly which navigable waters are public lands subject to federal subsistence management. As long as federal *and* state regulation is necessary, we expect the federal agencies and the state to cooperate fully to protect and provide the opportunity for subsistence fishing in navigable waters.

If we were to adopt the state's position, that public lands exclude navigable waters, we would give meaning to the term "title" in the definition of the phrase "public lands." But we would undermine congressional intent to protect and provide the opportunity for subsistence fishing.

If we were to adopt Katie John's position, that public lands include all navigable waters, we would give federal agencies control over all such waters in Alaska. ANILCA does not support such a complete assertion of federal control and the federal agencies do not ask to have that control.

The issue raised by the parties cries out for a legislative, not a judicial, solution. If the Alaska Legislature were to amend the state constitution or otherwise comply with ANILCA's rural subsistence priority, the state could resume management of subsistence uses on public lands including navigable waters. Neither the heavy administrative burden nor the complicated regulatory scheme that may result from our decision would be necessary. If Congress were to amend ANILCA, it could clarify both

the definition of public lands and its intent. Only legislative action by Alaska or Congress will truly resolve the problem.

REVERSED AND REMANDED.

HALL, Circuit Judge, dissenting:

I.

The issue in this case should be a simple one to resolve: Is the fish camp located in navigable waters at the confluence of the Tanaga Creek and Copper River, in the midst of the Wrangell-St. Elias National Park, "public land" for the purposes of Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3100, et seq.? It is, unfortunately, an incredibly complex issue[1] whose resolution will impact all the navigable waters in Alaska. Because I feel that we, as judges are not empowered to resolve this issue without direction from Congress, I dissent.

I agree with the majority that ANILCA defines "public land" as "lands, waters, and interests therein, the title to which is in the United States." Slip op. at 15741-42; 16 U.S.C. § 3102; *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 n.15 (1987).

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[1] In *Native Village of Quinhagak v. United States*, 35 F.3d 388, 392 (9th Cir. 1994), one panel of this Circuit held that this issue – whether "public lands" includes navigable waters – presented a "serious question" for preliminary injunction purposes. That panel has a gift for understatement.

Given this definition, this appears to be an easy case at first blush. Because the fish camp is in the midst of a National Park, the United States would seem to have title to all land and waters within the Park. 16 U.S.C. § 410hh(9) (creating Wrangell-St. Elias National Park and Preserve); S. Rep. 96-413, 1980 U.S.C.C.A.N. 5070 (noting that United States owns 7,990,000 acres of the Park). If so, the Park would be "public land" and ANILCA would apply.

One wrinkle in the facts of this case prevents the solution from being so simple, however. The fish camp lies in navigable waters. Under ANILCA, "public land" does not include land "validly . . . granted to . . . the State under any other provision of Federal Law." 16 U.S.C. § 3102(3)(A). The Submerged Lands Act of 1953 granted to the states all federal interests in the "lands beneath navigable waters." 43 U.S.C. § 1311(c) ("The United States hereby releases and relinquishes unto said States . . . all right, title and interest of the United States, if any it has, in and to all lands [beneath navigable waters], improvements, and natural resources."); *State of Alaska v. Athna, Inc.*, 891 F.2d 1401, 1403 (9th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990) ("States generally hold title to the lands underlying navigable rivers within their boundaries.").[2]

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[2] None of the exceptions to the Submerged Lands Act apply. Section 3101(f) carves out the first exception: The definition of "lands beneath navigable waters" excludes land grants from the United States to third persons. 16 U.S.C. § 3101(f). Neither party contends that the United States deeded Alaska's navigable waters to a third party.

Section 1313 includes two more exceptions. Under the first, the United States retains ownership over "all tracts or parcels of

Alaska therefore has title to the water within and land beneath the river containing the fish camp.

Given this analysis, the United States does not have "title" to the "land or water" containing the fish camp. The only way the fish camp can lie on "public land" as

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land together with all accretions thereto" which it had reserved at the time of statehood, or which it later acquires by condemnation. 16 U.S.C. § 3113(a). Since only dry land can have accretions, *Black's Law Dictionary* 19 (5th ed. 1979) (the term accretion is "usually applied to the graduate and imperceptible accumulation of land by natural causes"), this section does not apply to the land beneath navigable waters.

The second part of § 1313 excepts lands beneath navigable waters "held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians." 16 U.S.C. § 3112(b). Title to Alaska's navigable waters passed to Alaska at the time of its statehood, in 1959. Alaska Statehood Act, § 6(m), 72 Stat. 339, 343 (1959) ("The Submerged Lands Act of 1953 . . . shall be applicable to the State of Alaska . . ."). To prevent the automatic transfer of title, the United States would have to show that it was holding, land for the benefit of Native Alaskans in 1959; a later reservation would not reclaim land already given away. While it is clear that the native Alaskans are considered Indians, *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918) (applying presumption in favor of Indians to Alaskan natives), and it is probable that the Wrangell-St. Elias National Park was created in 1980 for the benefit of the Native Alaskans under ANILCA, *see* 16 U.S.C. § 410hh(9) (establishing Wrangell-St. Elias Park and referring to subsistence priorities of ANILCA), it is doubtful that the United States was holding that land for the benefit of the native Alaskans *in 1959*, 21 years before Congress expressed any intent to use the Park land to benefit Alaskan natives. The Ninth Circuit requires great proof of intent. *See Athna*, 891 F.2d at 1405-06 (refusing to conclude under similar language in § 4 of the Alaska Statehood Act, that the United States held land for the Alaskan natives absent express showing of intent to do so).

§ 3102 defines it is if the United States has "title" to any "interest" in those navigable waters.

To me, the crucial issue is one of statutory construction. What did Congress mean by "interest"? Congress left us few bread crumbs to follow because neither the statute itself nor its voluminous legislative history defines "interest."[3] Even the general legal definition of "interest" is unavailing. *See Black's Law Dictionary* 729 (5th ed. 1979) ("The word 'interest' is used in the Restatement of Property both generally to include varying aggregates of rights, privileges, powers and immunities and distributively to mean any one of them.").

This problem of lack of definition is compounded when we consider that the definition chosen will have far-reaching implications. If "interest" is defined narrowly, to comply with the traditional property law notion of "interest," then ANILCA would apply only if the United States could show a property interest, such as an easement, over these waters. If, on the other hand, "interest" is defined broadly, ANILCA may apply if the United

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[3] ANILCA's legislative history and its subsequent interpretation do contain conflicting conclusions about ANILCA's application to navigable waters. *Compare* 126 Cong. Rec. 29260, 29280 (1980) (statement of Rep. Udall) ("[I]t has always been our intent to apply the subsistence preference to all fish stocks in the waters of Alaska.") *with* 57 Fed. Reg. 22,940, 22,942 (1992) (Sec. of Interior) ("Because the United States does not generally own title to the submerged lands beneath navigable waters, Alaska, the public lands definition in ANILCA and these regulations generally excludes navigable waters."). Since these *conclusions* shed no light on how Congress intended "interest" to be defined and since they conflict in any event, they are of little use to my analysis.

States points to any sovereign power it may have over the waters at issue. Under the first definition, few if any of Alaska's navigable waters would fall under ANILCA; under the second, nearly all would. There is far more at stake here than one fishing camp.

I agree with the majority that Congress, in order to achieve its stated purpose, must have intended *some* navigable waters to fall under ANILCA so that defining "interest" narrowly to exclude all navigable waters is probably incorrect. Slip op. at 15741-42. I also concede that ambiguities in statutes should be construed in favor of the native Alaskans. *People of Village of Gambell v. Clark*, 746 F.2d 572, 581 (9th Cir. 1984) ("Ambiguities in Title VIII [of ANILCA] must be resolved in favor of the Alaska Native people."). However, I do not think it is for us to decide, on the basis of these two factors, that Congress intended "interest" to be defined so broadly so as to bring *all* of Alaska's navigable waters under ANILCA. Such a drastic change in the amount of control exercised by the federal government over all navigable waters in Alaska can only come from Congress. *See Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266-67 (1979) (requiring clear evidence of congressional intent to change the status quo).

II.

Even if I believed it was for us to make this choice, I do not believe that we could give effect to Congress' intent if we wanted to. None of the property doctrines currently available to us – regardless of how broadly we

define "interest" – could bring Alaska's navigable waters under ANILCA.

The majority embraces the doctrine of reserved water rights when it holds that the federal government impliedly reserved rights to the navigable waters within the Wrangell-St. Elias National Park when it withdrew that Park from the public domain. Slip op. at 15744-45; 16 U.S.C. § 410hh(9) (reserving Park but not expressly reserving navigable waters within the Park). The reserved water rights doctrine, which derives from the Commerce and Property Clauses, permits the United States impliedly to reserve the specific *quantity* of water necessary to fulfill the purpose of a federal reservation. *See Cappaert v. United States*, 426 U.S. 128, 138 (1976); *United States v. New Mexico*, 438 U.S. 696, 700 (1978).

Even assuming that Congress intended to reserve Alaska's navigable waters, both the case law and this doctrine's basis in the Property Clause limit this doctrine: The federal government can only reserve waters running over land that it owns. *See Hynes v. Grimes Packing Co.*, 337 U.S. 86, 110-16 (1949) (implying reservation of navigational waters already owned by the United States); *Alaska Pacific Fisheries*, 248 U.S. at (same); *Cappaert*, 426 U.S. 128 (implying reservation of non-navigable waters owned by the United States); U.S. Const., Art IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respect [sic] Territory or other Property *belonging to the United States*") (emphasis added); *cf. Athna*, 891 F.2d at 1401-04 (rejecting claim of implied reservation of navigable waters owned by state). Because *Alaska* has title to its navigable waters

under the Submerged Lands Act, the United States cannot reserve these waters. Moreover, the task of determining the exact *quantity* of water, from each body of navigable water, necessary to achieve the Congressional goal of subsistence fishing would be an administrative nightmare.

The next doctrine, the Commerce Power, is similarly inadequate. The Commerce Power is the acknowledgement that "Congress has extensive authority over this Nation's water under the Commerce Clause." *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979) (citing *Gibbons v. Ogden*, 22 U.S. 1, 189 (1824)). This authority "is as broad as the needs of commerce," *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 426 (1940).

This Power would seem to apply here. Even when Congress quitclaimed its ownership of navigable waterways in the Submerged Lands Act, it specifically retained this Power. 43 U.S.C. § 1314(a) ("The United States retains all its . . . powers of regulation and control of . . . navigable waters for the constitutional purposes of commerce [and] navigation."); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 282 (1977). Moreover, ANILCA's partial basis in the Commerce Clause, *see* 16 U.S.C. § 3111(4), might be construed as an implicit invocation of this Power. If it were, the United States could regulate subsistence uses in these waters as an exercise of the Commerce Power.

Because it is grounded in the Commerce Clause, however, the Commerce Power must satisfy traditional Commerce Clause analysis. *Kaiser Aetna*, 444 U.S. at 174. (holding that this Power is "viewed in terms of more

traditional Commerce Clause analysis"). ANILCA's subsistence provisions fail this analysis. Congress can only regulate activities that have "a substantial relationship to interstate commerce" or which "substantially affect" interstate commerce. *United States v. Lopez*, 115 S. Ct. 1624, 1629-30 (1995). It would be hard to argue that the priority of a handful of Alaskan natives over subsistence fishing in one river in Alaska would "substantially affect" interstate commerce. Although the natives might buy less fish from others, this would not have any noticeable effect on interstate demand for fish. Even if every rural Alaskan subsistence fished and never bought fish, it is still unlikely that interstate commerce would be "substantially affected." *Compare Wickard v. Filburn*, 317 U.S. 111 (1942) (finding that home consumption of wheat by every person in the United States would decrease demand for commercial wheat and would thereby defeat the purpose of the Agricultural Adjustment Act of 1938); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (finding that nationwide discrimination against African-Americans harms interstate commerce). Because the impact of ANILCA's subsistence priority in Alaskan navigable waters would not "substantially affect" interstate commerce, this priority cannot be upheld under the Commerce Power.

The final doctrine that might apply, the navigational servitude, is likewise inappropriate. Like the Commerce Power the navigational servitude is a power derived from the Commerce Clause and is not a species of property. *See City of Angoon v. Hodel*, 803 F.2d 1016, 1028 n.6 (9th Cir. 1986), *cert. denied*, 484 U.S. 870 (1987) ("[T]he United States does not hold title to the navigational servitude."); *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624,

628 (1961) ("The [navigational] servitude only encompasses the exercise of this federal *power.*") (emphasis added); *United States v. Twin City Power Co.*, 350 U.S. 222, 225-26 (1956) ("The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That clause speaks in terms of power not of property.").

Although both the navigational servitude and the Commerce Power share a common origin in the Commerce Clause, the servitude has a narrower purpose than the Power. *Boone v. United States*, 944 F.2d 1489, 1493 (9th Cir. 1991) ("[T]he navigational servitude is distinct from the power to regulate navigable waters."). The navigational servitude gives the federal government, for the sole purpose of seeing that the waterways remain navigable, the power to condemn land beneath navigable waterways without compensation. *See Kaiser Aetna*, 444 U.S. at 177 ("The navigational servitude . . . gives rise to the authority in the Government to assume that such streams retain their capacity to serve as continuous highways for the purpose of navigation in interstate commerce."); *Boone*, 944 F.2d at 1494 (holding that the servitude "generally relieves the government from the obligation to pay compensation for acts interfering with the ownership of riparian, littoral, or submerged lands which, if not for the fact that a waterway was involved, would require compensation under the Fifth Amendment."). Because the subsistence provisions of ANILCA do not further any navigational purpose, the servitude cannot be the basis to apply ANILCA.

Thus, we are unable to resolve this issue in this case, even if it were our place to do so.[4]

III.

It would be much more expedient if we could write on the slate Congress has left blank. It seems fairly clear that ANILCA's objectives would be best achieved by bringing all Alaskan navigable waters under ANILCA's reach, subject to the limitation of reasonable and noncommercial subsistence use.[5]

However, Congress has not so provided. We, as judges, have been asked to decide whether Alaska or the United States has control over all of Alaska's navigable waters. This is a decision we are neither qualified to, nor in this case capable of, deciding or implementing.

I am thus compelled to conclude that the United States has had no "interest" in Alaska's navigable waters since it gave them away in 1959. Those waters, including the fishing pond at issue here, are therefore not "public

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[4] Thus, Congress will probably have to condemn these waters or take some other action sufficient to make these doctrines applicable.

[5] A major objection to granting a subsistence priority to rural Alaskans is the fear that the rural Alaskans will abuse this priority and commercially exploit the fisheries to the detriment of non-rural Alaskans. This fear is misplaced, however, if ANILCA's provisions regarding the scope of the priority are strictly followed. ANILCA forbids "subsistence uses" that are "wasteful," 16 U.S.C. § 3112, and excludes from "subsistence uses" fish caught for commercial sale, 16 U.S.C. § 3113(2)(B). Thus, ANILCA already possesses safeguards against this type of abuse.

land" subject to ANILCA's subsistence priorities. For this reason, I would reverse the decision of the district court and wait for Congress to make its intentions clear.

Michael TOTEMOFF, Petitioner,
v.
STATE of Alaska, Respondent.
No. S-6151
Court of Appeals No. A-4276
Trial Court No. 3WH-91-25 Cr.
Supreme Court of Alaska.
Oct. 20, 1995.

Appearances: Paul E. Malin, Assistant Public Defender, John B. Salemi, Public Defender, Anchorage, for Petitioner. Joanne Grace, Assistant Attorney General, Anchorage, Bruce M. Botelho, Attorney General, Juneau, for Respondent.

Before: MOORE, Chief Justice, RABINOWITZ, MATTHEWS, COMPTON and EASTAUGH, Justices.

OPINION

MATTHEWS, Justice.

Subsistence hunter Mike Totemoff shot a deer with the aid of a spotlight in December 1990. The deer was killed on federal land, Naked Island in Prince William Sound. However, Totemoff was in a skiff in navigable waters surrounding Naked Island when he shined his spotlight at the deer and fired the fatal shot.

Totemoff was charged with violating 5 Alaska Administrative Code (AAC) 92.080(7), which prohibits hunting with the aid of an artificial light. Totemoff moved to have the indictment dismissed, arguing that the State did not have jurisdiction to prosecute him and that the regulation prohibiting spotlighting was invalid. To support some of his arguments, Totemoff presented evidence

that spotlighting is a customary and traditional means of hunting deer for subsistence in his native community of Tatitlek. The district court ruled that the State did have jurisdiction to prosecute Totemoff. The district court held that Alaska law prohibits subsistence hunters from challenging, in a criminal proceeding, the regulations under which they are prosecuted.

The case proceeded to trial, and Totemoff was convicted. The court of appeals affirmed. *Totemoff v. State*, 866 P.2d 125 (Alaska App.1993). We granted Totemoff's petition for hearing.

We must first decide whether the State has criminal jurisdiction over Totemoff, as jurisdiction is a threshold issue which must be decided before this court can address other issues presented in an appeal. *See Nattrass v. State*, 554 P.2d 399, 401 (Alaska 1976). Jurisdiction can be established either by finding that the State has the power to apply the spotlighting ban to subsistence hunters on federal land, or by determining that the State has exclusive jurisdiction over the navigable waters from which Totemoff fired his rifle. If we find that the State does have jurisdiction, we will then consider Totemoff's state law challenge to the anti-spotlighting regulation.

I. JURISDICTION OVER FEDERAL LAND

A state is free to enforce its civil or criminal laws on federal land within its boundaries unless the state consents to the exercise of exclusive federal jurisdiction, the state voluntarily cedes exclusive jurisdiction to the federal government, or the state's laws are preempted by federal law. *California Coastal Comm'n v. Granite Rock Co.*,

480 U.S. 572, 580-81 (1987); *Kleppe v. New Mexico*, 426 U.S. 529, 542-43 (1976); see also *Arizona v. Manypenny*, 445 F.Supp. 1123, 1125-26 (D.Ariz.1977), *rev'd on other grounds*, 451 U.S. 232 (1981). Alaska has not voluntarily ceded exclusive jurisdiction over hunting on federal land to the federal government or consented to exclusive federal control. Therefore, the State lacks jurisdiction to enforce its spotlighting ban against subsistence hunters on federal land only if enforcement is preempted by federal law.

Federal law can preempt state law in three ways. First, Congress may expressly declare that state law is preempted. Second, state law is preempted if Congress intends the federal government to occupy a field exclusively. Third, federal law preempts state law if the two actually conflict. *See, e.g., Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604-05 (1991); *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990). Totemoff argues that application of the spotlighting ban to him is preempted by the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. §§ 3101- 3233 (1988).

No provision in ANILCA expressly preempts state enforcement of state hunting laws against subsistence hunters on federal land. Thus, we must determine whether Congress intended for the federal government to exclusively occupy the field of regulation of subsistence activities when it enacted ANILCA, or whether state law actually conflicts with ANILCA.

A. Intent to Occupy Field

Congressional intent to occupy a field can be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the State to supplement it," or if a federal law "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *English*, 496 U.S. at 79 (alteration in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

However, " '[w]here . . . the field which Congress is said to have pre-empted' includes areas that have 'been traditionally occupied by the States,' congressional intent to supersede state laws must be 'clear and manifest.' " *Id.* (alteration in original) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). "When considering pre-emption, '[courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Mortier*, 501 U.S. at 605 (quoting *Rice*, 331 U.S. at 230).

Regulation of hunting is an area that has been traditionally occupied by the states. It is part of the historic police power of states. *See State v. Coffee*, 556 P.2d 1185, 1194 (Idaho 1976); *State ex rel. Nepstad v. Danielson*, 427 P.2d 689, 691 (Mont.1967); *see also Montana v. United States*, 450 U.S. 544, 564 n. 13 (1981). Therefore, we may find that Congress intended to occupy the field of regulation of subsistence hunting on federal land only if Congress' purpose was clear and manifest.

ANILCA does not disclose such a clear and manifest purpose. Title VIII of ANILCA governs subsistence hunting and fishing. 16 U.S.C. §§ 3111-26. Section 804 of Title VIII requires the taking of fish and wildlife on public lands for subsistence purposes to be accorded priority over the taking of fish and wildlife for other purposes. 16 U.S.C. § 3114. Section 802 states that it is the purpose of Congress "to provide the opportunity for rural residents engaged in a subsistence way of life to do so." 16 U.S.C. § 3112(1). Section 814 requires the Secretaries of Interior and Agriculture to promulgate regulations necessary to carry out their responsibilities under Title VIII. 16 U.S.C. § 3124. Sections 805(a)-(c) of Title VIII provide for the establishment of a network of regional advisory councils and local advisory committees to advise the Secretaries in the exercise of their authority under ANILCA. 16 U.S.C. §§ 3115(a)-(c).

Under § 805(d), the federal government was not to implement §§ 805(a)- (c) if Alaska enacted laws of general applicability providing "for the definition, preference, and participation specified" in Title VIII. 16 U.S.C. § 3115(d). Alaska did enact such laws,[1] but we struck down the rural preference provision of those laws as contrary to the Alaska Constitution in *McDowell v. State*, 785 P.2d 1 (Alaska 1989). As a result, the State fell out of compliance with ANILCA. The federal government subsequently promulgated temporary and then permanent regulations governing subsistence hunting on public land and implementing §§ 805(a)-(c) of Title VIII. 55 Fed.Reg. 27,114 (1990); 57 Fed.Reg. 22,940 (1992).

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[1] *See* ch. 151, SLA 1978; ch. 52, SLA 1986.

Even though Title VIII has been fully implemented, it does not create a scheme of federal regulation so pervasive that there is no room for state regulation to supplement it. Under Title VIII, the Secretaries of Interior and Agriculture implement ANILCA's subsistence priority and opportunity provisions with the participation and assistance of local and regional advisory councils. This does not foreclose the State from promulgating hunting and fishing regulations which may affect subsistence hunters on federal land, so long as those regulations do not conflict with federal laws or regulations. Nothing in Title VIII discloses a clear and manifest purpose to prohibit all state regulation of subsistence hunting. Nothing affirmatively prohibits the State from engaging in such regulation.

Moreover, § 1314 of ANILCA states, "Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in [Title VIII] of this chapter." 16 U.S.C. § 3202. Again, no provision in Title VIII clearly and manifestly prevents the State from enforcing its general hunting laws against subsistence hunters on federal land.

In addition, § 802(3) of Title VIII provides that the policy of Congress is that "[f]ederal land managing agencies, in managing subsistence activities on the public lands . . . shall cooperate with . . . appropriate State and Federal agencies." 16 U.S.C. § 3112(3). This section suggests that Congress did not intend a federal regulatory scheme so pervasive that there would be no room for state regulation to supplement it.

Finally, when the federal regulations promulgated pursuant to ANILCA were passed, the federal agencies administering ANILCA explained that the regulations would permit the State to continue to participate in the management of subsistence hunting on public land:

> *[T]hese regulations anticipate an interactive process between the State fish and game regulatory procedure.* The State, because of its constitution, cannot provide a preference for rural residents with customary and traditional use of fish and wildlife as required by ANILCA. *The State can facilitate harvest by rural residents through various regulations dealing with* ***means and methods of take*** *and perhaps other mechanisms.*
>
> If State regulations allow rural residents the opportunity to obtain their customary and traditional take and uses of fish and wildlife resources, the Federal regulations may closely parallel State regulations. *The Federal program anticipates a highly cooperative, interactive relationship with the State system.* To the extent that cooperation exists, the Federal program will be able to minimize change to traditional State regulation and management of fish and wildlife.

55 Fed.Reg. 27,114, 27,119 (1990) (emphasis added). Thus, the federal government clearly contemplated that Alaska means and methods regulations, the kinds of regulations at issue in this case, would be effective on federal land.

Since the language of ANILCA does not demonstrate a clear and manifest Congressional intent to preempt all state regulation affecting subsistence hunting and fishing on federal land, and since the federal agencies administering ANILCA have interpreted ANILCA as allowing

such state regulation, we hold that Congress did not intend for the federal government to exclusively occupy the field of subsistence hunting and fishing regulation.

B. Actual Conflict

We must next decide whether federal law actually conflicts with the enforcement of the state spotlighting ban against Totemoff on federal land. There is no direct conflict between Alaska's anti-spotlighting regulation, 5 AAC 92.080(7), and any federal statute or regulation. At the time of Totemoff's arrest, a federal subsistence hunting regulation virtually identical to the state regulation prohibited taking game with the aid of a spotlight. *Compare* 36 C.F.R. § 242.23(b)(1)(vii) (1990) *with* 5 AAC 92.080(7) (1990).

Totemoff's principal federal claim, however, is that federal law preempts application of the state spotlighting ban to him because federal law allows him to defend against prosecution on the grounds that spotlighting is a customary and traditional method of taking deer, while state law does not permit such a defense.[2] Totemoff relies on *United States v. Alexander*, 938 F.2d 942 (9th Cir.1991).

In *Alexander*, the defendants sold herring roe in violation of an Alaska regulation prohibiting sale of herring roe. *Id.* at 944-45. The court held that the defendants were

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[2] In *State v. Morry*, 836 P.2d 358, 370 (Alaska 1992), we held that the Boards of Fish and Game "have the discretion, *but are not mandated*, to take into consideration the traditional and customary methods of subsistence takings in their formulation of subsistence regulations." (Emphasis added.)

permitted to defend against criminal prosecution on the basis that they were engaged in customary trade for subsistence purposes, a subsistence use protected by ANILCA. *Id.* at 948. In deciding that customary trade was protected by ANILCA, the court cited ANILCA's definition of "subsistence uses" – "the customary and traditional uses by rural Alaska residents of wild renewable resources . . . for barter, or sharing for personal or family consumption; *and for customary trade.*" *Id.* at 946 (alteration in original).

The full text of ANILCA's definition of "subsistence uses" is:

> [T]he customary and traditional *uses* by rural Alaska residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; for the making and selling of handicraft articles out of nonedible byproducts of fish and wildlife resources taken for personal or family consumption; for barter, or sharing for personal or family consumption; and for customary trade.

ANILCA § 803, 16 U.S.C. § 3113 (emphasis added). This definition only covers various uses of subsistence resources. It does not cover traditional means and methods of hunting. And no other provision in ANILCA creates a general right to use traditional means and methods of taking game.

Title VIII of ANILCA does specifically protect the use of traditional means of surface transportation for subsistence hunting. Section 811(b) of Title VIII states, "Notwithstanding any other provision of this Act or other law,

the Secretary shall permit on the public lands appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents, subject to reasonable regulation." 16 U.S.C. § 3121(b). The protection of traditionally employed surface transportation methods implies that other traditional components of subsistence hunting or fishing, such as the use of certain guns, nets, or other equipment, are not exempt from state regulation.

Furthermore, numerous provisions in ANILCA require regulation of subsistence taking in accordance with sound wildlife management principles and the preservation of wildlife resources. *See* 16 U.S.C. §§ 3101(b), 3101(c), 3111(3), 3112(1), 3125(1). Restriction of traditional means and methods may be necessary to accomplish this goal. *See* ANILCA § 801(3), 16 U.S.C. § 3111(3) ("continuation of the opportunity for subsistence uses of resources on public and other lands in Alaska is threatened . . . by taking of fish and wildlife in a manner inconsistent with recognized principles of fish and wildlife management").

In addition, no case law directly holds that ANILCA protects customary and traditional methods of hunting. There is a case, however, which could provide support for such a holding, *Native Village of Quinhagak v. United States*, 35 F.3d 388 (9th Cir.1994). In *Quinhagak*, the court ruled that several native villages were entitled to a preliminary injunction against the enforcement of an Alaska regulation barring the taking of rainbow trout for subsistence purposes. *Id.* at 395. The court held that the villages presented a showing of hardship sufficient to justify the preliminary injunction, since they demonstrated that

rainbow trout was an important food source for them. *Id.* at 393. The court then added:

> The Villages also presented evidence that the federal and state regulations interfere with their way of life and cultural identity. . . . They needed to prove nothing more in light of the clear congressional directive to protect the cultural aspects of subsistence living. 16 U.S.C. § 3111(1) [ANILCA § 801(1)] ("[T]he continuation of the opportunity for subsistence uses by rural residents of Alaska . . . is *essential to Native* physical, economic, traditional, and *cultural existence*. . . . ").

Id. at 394 (alteration in original).

It might be inferred from this language that ANILCA protects traditional subsistence taking means and methods which are part of the cultural identity and way of life of Natives. However, *Quinhagak* only held that the villages were entitled to a preliminary injunction and did not resolve the merits of any controversy concerning the interpretation of ANILCA. Though an argument can be made based on *Quinhagak* that ANILCA does protect customary and traditional means and methods, we conclude that more weight should be accorded to Congress' failure to mention means and methods in ANILCA's definition of "subsistence uses" and to Congress' specific grant of protection to traditional means of surface transportation.

We hold that ANILCA does not protect the use of a spotlight as a customary and traditional method of subsistence hunting, and thus there is no actual conflict between ANILCA and Alaska law. Therefore, federal law does not preempt enforcement of Alaska's spotlighting

ban against subsistence hunters on federal land, and the State does have jurisdiction over Totemoff.

II. JURISDICTION OVER NAVIGABLE WATERS

Even if ANILCA does protect customary and traditional means and methods, thereby preempting state enforcement of the anti-spotlighting regulation against Totemoff on federal land, the State still has criminal jurisdiction if ANILCA does not apply to the navigable waters from which Totemoff shined his spotlight at the deer. Totemoff's conduct of taking a deer with the aid of an artificial light was committed partly in navigable waters and partly on federal land. If the elements of a crime are committed in different jurisdictions, "any state in which an essential part of the crime is committed" may assert jurisdiction. *State v. Scofield*, 438 P.2d 776, 784 (Ariz.App.1968). "If an offense is committed partly on federal and partly on non-federal property, both sovereigns have jurisdiction." *State v. Kirksey*, 647 S.W.2d 799, 804 (Mo.1983) (en banc).

See also Lane v. State, 388 So.2d 1022, 1028 (Fla.1980) (though fatal blow struck in Alabama, Florida has jurisdiction over murder if either premeditation to murder or felony underlying murder occurred in Florida); *Commonwealth v. Lanoue*, 95 N.E.2d 925, 926 (Mass.1950) (if a criminal act is committed in two jurisdictions, a state has jurisdiction over the act if the part of the act committed within that state has been declared to be punishable by its laws); *State v. Kills on Top*, 793 P.2d 1273, 1285-86 (Mont.1990) (Montana has jurisdiction over felony-murder even though victim killed in Wyoming because

underlying felony, kidnapping, occurred in Montana), *cert. denied*, 501 U.S. 1259 (1991); *People v. Fuller*, 586 N.Y.S.2d 366, 367-68 (N.Y.App.) (New York has jurisdiction over rape defendant, even though actual sexual assault may have taken place in Pennsylvania, because element of forcible compulsion occurred in New York), *appeal denied*, 591 N.Y.S.2d 144 (N.Y.1992); *Brown v. Market Dev., Inc.*, 322 N.E.2d 367, 372 (Ohio C.P. 1974) (Ohio would have jurisdiction over a person who stood in Ohio and fired a shot across the state border, killing someone in Indiana). *But see State v. Hall*, 19 S.E. 602, 604-05 (N.C. 1894) (North Carolina did not have jurisdiction over defendant who while standing in North Carolina shot victim in Tennessee, since no North Carolina statute criminalized the conduct which occurred in North Carolina or otherwise conferred jurisdiction upon the state).

In this case, Totemoff's act of shining a spotlight and firing the fatal shot, an essential part of the crime with which he was charged, unlawful taking of game, occurred on navigable waters. Moreover, Alaska law specifically criminalizes conduct which Totemoff committed solely on navigable waters. Alaska Statute 16.05.940(33) defines "take" as "taking, pursuing, hunting, fishing, trapping, or in any manner disturbing, capturing, or killing or attempting to take, pursue, hunt, fish, trap, or in any manner capture or kill fish or game." Totemoff took actions in navigable waters which constitute "pursuing," "hunting," "disturbing," and "attempting to take, pursue, hunt . . . or in any manner capture or kill" deer. Therefore, the State has jurisdiction over Totemoff, even if ANILCA preempts the application of the spotlighting ban on federal land, so long as ANILCA does not give the

federal government the power to regulate hunting and fishing in navigable waters.

ANILCA's subsistence priority applies only to "public lands." ANILCA § 804, 16 U.S.C. § 3114. Section 102 of ANILCA defines the term "public lands":

> (1) The term "land" means lands, waters, and interests therein.
>
> (2) The term "Federal land" means lands the title to which is in the United States after December 2, 1980.
>
> (3) The term "public lands" means land situated in Alaska which, after December 2, 1980, are Federal lands, except
>
> (A) land selections of the State of Alaska which have been tentatively approved or validly selected under the Alaska Statehood Act and lands which have been confirmed to, validly selected by, or granted to the Territory of Alaska or the State under any other provision of Federal law.

16 U.S.C. § 3102. Thus, "public lands" means lands, waters, and interests therein, the title to which is in the United States. But "public lands" does not include lands, waters, and interests therein which were transferred to Alaska under other federal laws.

Whether "public lands" includes navigable waters was the subject of a recent Ninth Circuit decision, *Alaska v. Babbitt* (Katie John), 54 F.3d 549 (9th Cir.1995), *petitions for cert. filed*, 63 U.S.L.W. 3819 (U.S. May 5, 1995) (No. 94-1829), 63 U.S.L.W. 3874 (U.S. June 2, 1995) (No. 94-1976). The *Katie John* court considered whether

ANILCA applies to navigable waters because of the federal government's navigational servitude or federal reserved water rights.

The navigational servitude is a dominant servitude, sometimes described as a "superior navigation easement," which allows the federal government to exercise its regulatory power over navigable waters in the interests of commerce without compensation for interference with private water rights. *United States v. Virginia Elec. & Power Co.*, 365 U.S. 624, 627-28 (1961); *Boone v. United States*, 944 F.2d 1489, 1493-94 (9th Cir.1991). The servitude "is a concept of power, not of property." *United States v. Certain Parcels of Land Situated in Valdez*, 666 F.2d 1236, 1238 (9th Cir.1982). It is a "dominant right over navigable waters for purposes of improving and regulating navigation." *United States v. 119.67 Acres of Land, More or Less, Situated in Plaquemines Parish, La.*, 663 F.2d 1328, 1330 n. 5 (5th Cir.1981). The navigational servitude is derived from the Commerce Clause. *See United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700, 704 (1987); *Boone*, 944 F.2d at 1494 n. 9.

Under the reserved water rights doctrine, when Congress withdraws land from the public domain for a federal purpose, it implicitly reserves water necessary to accomplish the purposes of the reservation. *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir.), *cert. denied*, 454 U.S. 1092 (1981). "The United States acquires a water right vesting on the date the reservation was created, and superior to the rights of subsequent appropriators." *Colville*, 647 F.2d at 46. The amount of water reserved under the doctrine is limited to what is necessary to fulfill the

purpose of the land reservation. *Cappaert*, 426 U.S. at 141; *United States v. Adair*, 723 F.2d 1394, 1409 (9th Cir.1983), *cert. denied*, 467 U.S. 1252 (1984).

A reservation of water may be implied only where the water is necessary for the primary purpose of the federal reservation, not where the water merely serves secondary purposes of the reservation. *United States v. New Mexico*, 438 U.S. 696, 702 (1978); *Adair*, 723 F.2d at 1408-09. In determining the scope of implied reserved water rights, a court may look only to the primary purpose of a reservation at the time the land was first reserved by the federal government, and may not consider other purposes later given to the reservation. *See New Mexico*, 438 U.S. at 713-15. The reserved water rights doctrine has at times been treated as giving the government only a non-consumptive right to prevent others from using a supply of water in a manner that would deprive the federal reservation of the water necessary for its primary purpose; at other times, the doctrine has been interpreted as giving the United States the right to a specific amount of water. *Compare Cappaert*, 426 U.S. at 135, 143 *and Adair*, 723 F.2d at 1411 *with Arizona v. California*, 373 U.S. 546, 600-01 (1963) *and Colville*, 647 F.2d at 47.

The Ninth Circuit in *Katie John* decided that the navigational servitude is not an interest to which the United States holds title and ruled that the navigational servitude does not convert all Alaska navigable waters to "public lands" as defined in ANILCA. 54 F.3d at 553. In doing so, the court reversed a federal district court decision which held that the navigational servitude is an interest to which the United States holds title for the purposes of ANILCA. *John v. United States*, Nos.

A90-0484-CV, A92-0264-CV, 1994 WL 487830, at *17 (D.Alaska March 30, 1994). The Ninth Circuit also held in *Katie John* that reserved water rights are interests in land to which the federal government has title under ANILCA's definition of "public lands." 54 F.3d at 554.

We are not obliged to follow *Katie John*, since this court is not bound by decisions of federal courts other than the United States Supreme Court on questions of federal law. *In re F.P.*, 843 P.2d 1214, 1215 n. 1 (Alaska 1992), *cert. denied*, 113 S.Ct. 2441 (1993). Though the State was a party to *Katie John*, it is not collaterally estopped here as to the issues decided in that case because the applicability of ANILCA to navigable waters is a pure question of law which does not involve factual issues. *See State v. United Cook Inlet Drift Ass'n*, 895 P.2d 947, 954 (Alaska 1995) ("the State is permitted to relitigate unmixed questions of law so long as the subject matter of the second case is 'substantially unrelated' to that of the first"). We will follow *Katie John* only to the extent that its reasoning is persuasive.

For a number of reasons, we find that neither the navigational servitude nor reserved water rights bring navigable waters within ANILCA's definition of "public lands," and that the federal government has no authority based on the navigational servitude or the reserved water rights doctrine to regulate hunting and fishing in Alaska's navigable waters.

First, even if the navigational servitude or reserved water rights can be considered interests to which the United States holds title, the State has an interest in fish and wildlife located in navigable waters which precludes

federal regulation of such fish and wildlife, under s 102(3)(A) of ANILCA and the Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-56 (1988). Section 102(3)(A) of ANILCA exempts from the definition of "public lands" "lands which have been . . . granted to the Territory of Alaska or the State under any other provision of Federal law." 16 U.S.C. § 3102(3)(A). As ANILCA § 102(1) defines "land" as "lands, waters, and interests therein," 16 U.S.C. § 3102(1), "public lands" does not include lands, waters, and interests therein granted to Alaska under another federal law.

A relevant interest in lands or waters is granted to Alaska by the Submerged Lands Act of 1953. Section 3(a) of the Act states:

> It is hereby determined and declared to be in the public interest that (1) *title to and ownership of* the lands beneath navigable waters within the boundaries of the respective States, and *the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said* lands and *natural resources* all in accordance with applicable State law be, and they *are*, subject to the provisions hereof, *recognized, confirmed, established and vested in and assigned to the respective States* or the persons who were on June 5, 1950,[3] entitled thereto under the law of the respective States in which the land is located,

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[3] Under the Alaska Statehood Act, "[t]he Submerged Lands Act of 1953 [is] applicable to the State of Alaska and the said State [has] the same rights as do [other] States thereunder." Pub.L. No. 85-508, § 6(m) (1958), *reprinted in* 48 U.S.C. following § 5 (1988).

> and the respective grantees, lessees, or successors in interest thereof.

43 U.S.C. § 1311(a) (emphasis added). Section 2(e) of the Act states, "[t]he term 'natural resources' includes . . . fish, shrimp, oysters, clams, crabs, lobsters, sponges, kelp, and other marine animal and plant life." 43 U.S.C. § 1301(e).

The Submerged Lands Act thus gives Alaska ownership of, title to, and management power over the following: lands beneath the navigable waters of Alaska,[4] the navigable waters themselves,[5] and fish and other marine life located in Alaska's navigable waters. Under § 102(3)(A) of ANILCA, the definition of "public lands" in ANILCA therefore excludes navigable waters.

Furthermore, § 6(a) of the Submerged Lands Act specifically precludes the navigational servitude from being used to give the federal government power over

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[4] The term "lands beneath navigable waters" covers

> all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles.

43 U.S.C. § 1301(a)(2).

[5] The U.S. Supreme Court has referred to the Submerged Lands Act as a grant of "submerged lands and waters." *United States v. California*, 436 U.S. 32, 37 (1978).

fish or animals in state navigable waters. The section states:

> The United States retains all its *navigational servitude and rights in* and powers of regulation and control of said lands and *navigable waters* for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but *shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of* the lands and *natural resources which are specifically* recognized, confirmed, established, and *vested in* and assigned to the respective *States* and others *by section [3]* of this [Act].

43 U.S.C. § 1314(a) (emphasis added). Under this statute, the navigational servitude and other federal rights in navigable waters cannot give the federal government ownership of navigable waters or management rights over fish and animals in navigable waters, as those rights are reserved to the states by § 3 of the Submerged Lands Act.

The second reason supporting our decision that ANILCA does not give the federal government power to regulate hunting and fishing in navigable waters is that the navigational servitude and reserved water rights are not the type of property interests to which title can be held. Authorities disagree on whether the term "title" applies only to fee ownership of property or also covers lesser possessory interests such as lease interests. *Dover Veterans Council, Inc. v. City of Dover*, 407 A.2d 1195, 1196 (N.H. 1979); *see also United States v. Hunter*, 21 F. 615, 617 (C.C.E.D. Mo. 1884); *compare United States v. City of New*

Brunswick, 11 F.2d 476, 477 (3d Cir. 1926) ("the ownership of title means ownership of property"), *rev'd on other grounds*, 276 U.S. 547 (1928) *and Schaible v. Fairbanks Medical & Surgical Clinic, Inc.*, 531 P.2d 1252, 1260 (Alaska 1975) (conventional definition of "title" is ownership of the premises) *with Shingleton v. State*, 133 S.E.2d 183, 189 (N.C. 1963) ("title" signifies actual or constructive possession of property or the right to possession) *and East Norriton Medical Assocs., Ltd. v. Commonwealth*, 650 A.2d 1169, 1171 (Pa. Commw. Ct. 1994) (cites statute which defines "title" as a possessory or leasehold interest). However, it is generally accepted that "title" signifies at least some sort of possessory interest in property and does not include lesser interests such as easements. *See Kohl Indus. Park Co. v. County of Rockland*, 710 F.2d 895, 903 (2d Cir. 1983).

Neither the navigational servitude nor reserved water rights are possessory interests in a body of water. The navigational servitude has been described as a "dominant servitude" and as a "superior navigation easement." *Virginia Elec. & Power*, 365 U.S. at 627. Reserved water rights give the federal government the right to prevent others from appropriating water or to use a certain volume of water, not to possess a body of water. *See Cappaert*, 426 U.S. at 135, 143; *Arizona*, 373 U.S. at 600-01. Therefore, the United States cannot hold title to the navigational servitude or reserved water rights.

A similar conclusion was reached by a New York court when New York State claimed that it had title to submerged lands by virtue of state interests analogous to the federal navigational servitude and federal reserved water rights. In *Niagara Falls Power Co. v. Water Power &*

Control Commission, 262 N.Y.S. 217, 219-221 (N.Y. App. 1932), *rev'd on other grounds*, 196 N.E. 51 (N.Y.), *cert. denied*, 296 U.S. 609 (1935), an issue relevant to determining the amount of rent the state could charge for a water power site located on submerged lands which had been previously granted to a private company was whether "title" to the "water power sites or lands" was "vested in the state." The state argued that it had "title" through "[i]ts sovereignty and incidental control over navigable waters," a power similar to the federal navigational servitude, or through interference the power site could cause with state riparian rights appurtenant to a state park, an interest similar to federal reserved water rights. *Id.* at 221. The court rejected these arguments, explaining that these "inchoate and incorporeal" rights did not constitute "title." *Id.* at 224-25.

Our conclusion that the navigational servitude and reserved water rights are not interests to which the United States holds title may raise the question of what Congress intended when it included "interests" in "lands" or "waters," "the title to which is in the United States," within ANILCA's definition of "public lands." *See* ANILCA §§ 102(1)-(3), 16 U.S.C. §§ 3102(1)-(3). A logical answer is that the word "interests" was intended to cover possessory interests lesser than fee interests such as leases, as there is considerable authority that title can be held to such interests. *See, e.g., Shingleton*, 133 S.E.2d at 189; *East Norriton*, 650 A.2d at 1171.

A broader reading would conflict with the clear statement doctrine, which is the third ground underlying our ruling on the navigable waters issue. The clear statement doctrine "counsels that a . . . court should not apply a

federal statute to an area of traditional state concern unless Congress has articulated its desire in clear and definite language to alter the delicate balance between state and federal power by application of the statute to that area." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 495 n. 6 (8th Cir.) (quoting *Taffet v. Southern Co.*, 930 F.2d 847, 851 (11th Cir.1991), *vacated on other grounds and reh'g granted*, 958 F.2d 1514 (11th Cir.), *on reh'g en banc*, 967 F.2d 1483 (11th Cir.), *cert. denied*, 113 S.Ct. 657 (1992)), *cert. denied*, 504 U.S. 957 (1992). The doctrine means that "[i]f Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' " *California State Bd. of Optometry v. Federal Trade Comm'n*, 910 F.2d 976, 981 (D.C.Cir. 1990) (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)); *see also BFP v. Resolution Trust Corp.*, 114 S.Ct. 1757, 1764-66 (1994). The doctrine applies "in circumstances in which the language of a statute or its legislative history provide some indication of ambiguity." *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1306 (2d Cir.1990).

In this case, ANILCA's definition of "public lands" would have to be viewed as ambiguous before it could be interpreted as covering the navigational servitude or reserved water rights Defining "public lands" as waters subject to the navigational servitude or reserved water rights would allow the federal government to regulate hunting and fishing in navigable waters. States have traditionally had the power to govern hunting and fishing in their navigable waters. Regulation of hunting and fishing is a traditional concern of the states. *See Coffee*, 556 P.2d at

1194; *Danielson*, 427 P.2d at 691. Congress has not expressed in unmistakably clear language a desire to alter this traditional allocation of state and federal power.

The fourth basis for our decision on this matter is that, even assuming the navigational servitude or reserved water rights are interests to which the United States holds title, the land management authority which the federal government obtains through these interests is limited by the purposes of the interests. The power any easement, servitude, or similar property interest gives to its holder is limited by the interest's purpose. *See, e.g., Southern Pac. Co. v. City of San Francisco*, 396 P.2d 383, 386 (Cal. 1964); *Benno v. Central Lake County Joint Action Water Agency*, 609 N.E.2d 1056, 1060 (Ill. App.), *appeal denied*, 616 N.E.2d 331 (Ill. 1993). For example, an easement giving a person the right to cross over another's property for access to his own land does not create a right to use the property subject to the easement for any other purpose.

Likewise, the navigational servitude only gives the United States the power to regulate navigable waters for navigation purposes without owing compensation, *Boone*, 944 F.2d at 1493-94; it does not permit federal regulation of hunting and fishing in navigable waters. Similarly, the reserved water rights doctrine only grants to the government the right to either exclude others from appropriating water which feeds a government reservation or to use a limited volume of water in order to serve the federal land reserved. *See Cappaert*, 426 U.S. at 135, 143; *Arizona*, 373 U.S. at 600-01. The doctrine does not provide the federal government with plenary power over a body of water.

Fifth, neither the navigational servitude power to regulate for navigation purposes nor the power to reserve water rights can grant the federal government jurisdiction to manage hunting and fishing in navigable waters. The two powers are over navigation and water, not fish and game.

The final reason for our ruling on the navigable waters issue concerns reserved water rights only. Employing the reserved water rights doctrine to define the geographic scope of navigable waters covered by ANILCA would be highly impractical, perhaps even impossible. It would first require the federal agencies administering ANILCA to determine the primary purpose of each federal land reservation in Alaska at the time the reservation was created. *See New Mexico*, 438 U.S. at 702, 713-15. Then, the federal agencies would have to ascertain the amount of water necessary to fulfill the primary purpose of the reservation. *See Cappaert*, 426 U.S. at 141. Afterwards, the agencies would have to somehow convert that amount of water into a surface area of water constituting "public lands" under ANILCA. This last step could be especially difficult, because reserved water rights represent the right to use a set volume of water or to prevent others from appropriating water, and not specific geographic areas around which property lines may be drawn. Congress could not have intended to create such a complicated and uncertain regulatory scheme.

Despite acknowledging that it was "impos[ing] an extraordinary administrative burden on federal agencies," the Ninth Circuit held in *Katie John* that reserved water rights are interests in land to which the federal government has title for ANILCA purposes. 54 F.3d at

554. The court's holding was based on two grounds. First, the court believed that the position taken by the federal agencies that reserved water rights do define the scope of ANILCA was a reasonable agency interpretation owed deference. *See id.* at 552-54. Second, the court feared undermining Congress' intent to protect subsistence fishing. *See id.* at 552, 554. In our view, neither of these considerations justifies the court's holding.

We apply federal law on deference in determining whether deference is owed to a federal agency's legal position. Under federal deference law, the *Katie John* court should not have deferred to the federal agencies' position on the meaning of ANILCA's definition of "public lands." *See id.* at 554. This position was first adopted by the federal government at oral argument before the district court. *Id.* at 552. Prior to that, the federal regulations promulgated pursuant to ANILCA and the explanations of those regulations had repeatedly generally excluded navigable waters from the definition of "public lands." *See* 36 C.F.R. § 242.3(b) (1994); 57 Fed.Reg. 22,940, 22,941 (1992); 56 Fed.Reg. 29,310, 29,311 (1991); 55 Fed.Reg. 27,114, 27,115 (1990).[6]

The federal government's new position that ANILCA covers navigable waters in which the United States has reserved water rights is a position taken during litigation, not a regulation or agency interpretation that is owed deference. The federal government's new position has not

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[6] Certain navigable waters over submerged lands to which the United States holds title were included in the definition of "public lands." *See* 36 C.F.R. 242.3(b); 57 Fed.Reg. 22,940, 22,941 (1992).

been formalized in any regulation. *See* 60 Fed.Reg. 31,542, 31,542-43 (1995). Positions on interpretations of statutes adopted by agencies during litigation which contradict earlier regulations are not owed deference by courts. *See Wolpaw v. Commissioner*, 47 F.3d 787, 790 (6th Cir.1995) (position announced by federal agency in the course of litigation owed no deference). If any interpretation is owed deference, it is the interpretation in the federal regulations that ANILCA generally does not apply to navigable waters, not the position adopted in a litigation context. *See id.* (while litigation position not owed deference, agency's earlier regulations may be entitled to some deference); *see also General Elec. Co. v. Gilbert*, 429 U.S. 125, 142-46 (1976) (Court refuses to defer to agency interpretation contradicting previous, long-standing interpretation and follows earlier interpretation).

Deference is not due to the new federal position for several other reasons. The definition of "public lands" under ANILCA is a pure question of statutory construction. *See Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 445-46 (1987) (suggesting that no deference or lesser degree of deference is due to agency interpretation if issue before court is pure question of statutory construction). The issue involves no technical agency expertise. *See Thomas Jefferson Univ. v. Shalala*, 114 S.Ct. 2381, 2387 (1994) (deference more warranted when interpretation involves technical agency expertise). The federal agencies' position is not a long-standing one. *See Bowen v. American Hosp. Ass'n*, 476 U.S. 610, 646 n. 34 (1986) (if agency interpretation is neither consistent nor

longstanding, the degree of deference it deserves is substantially diminished). Most importantly, the recent federal interpretation is not a reasonable, permissible construction of ANILCA, for the numerous reasons given earlier. *See National R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992) ("a reviewing court need not accept an interpretation which is unreasonable"); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (deference may be given to agency interpretation only if it is based on permissible construction of statute).

We also respectfully disagree with the conclusion of the court in *Katie John* that utilizing reserved water rights to define the scope of ANILCA is necessary to fulfill Congress' intent to protect subsistence fishing. The court noted that Congress intended ANILCA to protect subsistence uses, that subsistence uses include subsistence fishing, and that subsistence fishing has traditionally taken place in navigable waters. 54 F.3d at 552. The court then stated, "Thus, we have no doubt that Congress intended that public lands include at least some navigable waters." *Id.* The court later stated that ruling that neither the navigational servitude nor reserved water rights constitute interests to which the United States holds title for ANILCA purposes "would undermine congressional intent to protect and provide the opportunity for subsistence fishing." *Id.* at 554.

However, the definition of "public lands" in the federal regulations issued pursuant to ANILCA does include navigable waters over submerged lands owned by the United States. *See* 36 C.F.R. § 242.3(b); 57 Fed.Reg. 22,940,

22,941 (1992).[7] Moreover, some subsistence fishing takes place in non-navigable waters which are "public lands." *See, e.g., Quinhagak,* 35 F.3d at 391. Therefore, fulfilling Congress' intent to provide an opportunity for subsistence fishing does not require ruling that reserved water rights define "public lands" under ANILCA.

Because the Submerged Lands Act of 1953 specifically gives states authority over fish and animals in navigable waters and precludes the navigational servitude or reserved water rights from being used to erode that authority, because the navigational servitude and reserved water rights are not interests to which title can be held, because of the clear statement doctrine, because the navigational servitude and reserved water rights are limited interests which do not give the federal government power over navigable or reserved waters unrelated to those interests, and for the other reasons discussed above, we hold that navigable waters are generally not "public lands" under ANILCA. Therefore, ANILCA does not curtail the State's authority to regulate hunting and fishing in navigable waters, and the State has criminal jurisdiction over Totemoff.

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[7] The area encompassed in the regulation defining ANILCA's scope is substantial. It includes, to name only the largest areas, the Arctic Ocean watershed from the Canadian border to Cape Lisbourne on the Chukchi Sea, and virtually all of the Aleutian Islands. *See* 36 C.F.R. § 242.3(b)(1), (4).

IV. CONCLUSION

We hold that the State has jurisdiction over Totemoff because it has the power to enforce its hunting and fishing laws against subsistence users on federal land, so long as those laws do not conflict with federal laws or regulations. There is no such conflict in this case, since there is no federal right to employ customary means and methods of taking. We further hold that the State has jurisdiction over Totemoff because he violated Alaska law in navigable waters above state lands and ANILCA does not give the federal government the power to regulate subsistence hunting and fishing in such navigable waters.

We REVERSE the decision of the court of appeals that Eluska bars Totemoff from challenging the spotlighting regulation. Alaska Statute 16.05.259 also does not stop Totemoff from contesting the regulation. We hold that the regulation is invalid under *Morry* only if the Board failed to comply with the requirements of AS 44.62.180-.290. *Morry* does not impose a substantive hearing requirement on the Board not contained in the APA.

We REMAND this case to the district court for development of the record relevant to Totemoff's procedural challenge to the spotlighting ban. If Totemoff demonstrates that the Board did not comply with the requirements of AS 44.62.180-.290 when it passed 5 AAC 92.001 or 5 AAC 92.080(7), the district court should vacate Totemoff's conviction and dismiss the charges against him. Otherwise, the conviction is to stand.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ALASKA, Plaintiff-Appellant, v. BRUCE BABBITT, Secretary of the Interior, et al., Defendants-Appellees.	No. 94-35480 D.C. No. CV-92-00264-HRH
KATIE JOHN, et al., Plaintiffs-Appellees, v. UNITED STATES OF AMERICA, et al., Defendants-Appellants.	No. 94-35481 D.C. No. CV-90-00484-HRH ORDER (Filed Aug. 8, 1995)

Before: WRIGHT, HALL and WIGGINS, Circuit Judges.

The panel has voted to deny the petition for rehearing, and Judges Hall and Wiggins have voted to reject the suggestion for a rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is **DENIED** and the suggestion for a rehearing en banc is **REJECTED.**

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

October 26, 1995

Ms. Joanne M. Grace
Assistant Attorney General
1031 W. 4th Avenue
Anchorage, AK 99501

Re: Alaska
v. Bruce Babbitt, Secretary of the Interior, et al.
Application No. A-372

Dear Ms. Grace:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on October 26, 1995, extended the time to and including December 6, 1995.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By /s/ Melissa A. Blalock
Melissa A. Blalock
Assistant Clerk

Robert T. Anderson
Lawrence A. Aschenbrenner
Bart K. Garber
NATIVE AMERICAN RIGHTS FUND
310 K Street, Suite 708
Anchorage, Alaska 99501
Attorneys for Plaintiffs
(907) 276-0680

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

KATIE JOHN, DORIS CHARLES AND MENTASTA VILLAGE COUNCIL,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA, MANUEL LUJAN, in his official capacity as Secretary of the United States Department of the Interior and CLAYTON K. YEUTTER, in his official capacity as Secretary of Agriculture, CARL ROSIER, in his official capacity as the Commissioner of the Alaska Department of Fish and Game and the STATE OF ALASKA,

Defendants.

No. A90-484 CIV

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs bring this action pursuant to section 807 of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. § 3117. The Court's jurisdiction is also invoked pursuant to 28 U.S.C. § 1331 and through 28 U.S.C. § 1362. Venue properly lies in the District of Alaska under 28

* * *

Fourth Cause of Action

28. Paragraphs 1-19 are hereby incorporated by reference.

29. The state of Alaska has no jurisdiction over the waters of the Copper River and Tanada Creek since such waters constitute "public lands" as defined by ANILCA. As to any part of the Copper River system, Tanada Creek, or the Gulf of Alaska which do not constitute public lands, the state is preempted from regulating fisheries under its jurisdiction which in any way infringes on, or adversely affects in any way, plaintiffs' opportunity to fish for subsistence at Batzulnetas.

PRAYER FOR RELIEF

Wherefore, plaintiffs request the Court to:

(a) issue a declaratory judgment that waters of Tanada Creek and the Copper River are "public lands" as defined by ANILCA;

(b) issue a declaratory judgment that the federal defendants' refusal to provide for a non-wasteful subsistence fishery at Batzulnetas is a restriction of a subsistence use contrary to Title VIII of ANILCA;

(c) issue a declaratory judgment that the federal defendants' refusal to provide for a fishery at Batzulnetas is unlawful due to a conflict with the Alaska Native Allotment Act of 1906

(d) issue a declaratory judgment that the federal defendants' policy of refusing to allow deviations and modifications to the Batzulnetas trail is unlawful;

(e) order the federal defendants to promulgate a regulation providing for a subsistence fishery at Batzulnetas and declare that such defendants have a duty to preclude the state defendants from taking any action on non-public lands which interferes with plaintiffs' harvest opportunities on public lands;

(f) declare that defendants State of Alaska and Rosier have no jurisdiction over the waters of the Copper River system, including the Copper River and Tanada Creek, which constitute "public lands" and that such defendants are prohibited from taking any action on non-public lands which in any way interferes with the plaintiffs' rights on "public lands" and enjoin such defendants from taking any such action;

(g) award plaintiffs the costs of this action and reasonable attorney's fees;

(h) award plaintiffs such other relief as may be reasonable and necessary.

RESPECTFULLY SUBMITTED,

DATED: March 18, 1991 By: /s/ Robert T. Anderson
Robert T. Anderson
of Attorneys for
Plaintiffs

COMPARATIVE HISTORY OF FEDERAL AND STATE MANAGEMENT OF FISHERIES IN ALASKA

Prepared by Ron Regnart

Alaska Department of Fish and Game
ANILCA Program Office
Anchorage, Alaska

June 1993

* * *

In spite of the long history of bad feelings associated with management of Alaska's fishery, the transfer of regulatory authority over fisheries was accomplished smoothly. The territorial Department of Fisheries, in existence since 1949, had established it competence, and its much greater public acceptance made this task easier (Crutchfield et al. 1969 p. 103).

State Management of Fisheries

Description of Fisheries

During the first fifteen years of state management, salmon harvests remained at relatively low levels (Figure 1). Some improvement was noted in runs and harvests during the 1960s due to better management practices, some of which were initiated by federal managers in the late 1950s. Extremely poor environmental conditions resulted in very small returns to some areas during 1967 and 1972 through 1975 (Pennoyer 1978 p. 24; University of Alaska 1972 p. 302). This resulted in the adoption of severe fishery restrictions to insure achievement of optimal spawning escapements. Management improvements initiated by the state began paying off after 1975 when

annual salmon harvests began increasing. The annual salmon harvest has averaged 116 million fish since 1975 and 133 million fish since 1980. Since 1980, the record harvest (126 million) made under federal control has been exceeded during eight years. A record harvest of 187 million salmon occurred in 1991 (Figure 1).

The Alaskan seafood industry has expanded greatly and is much more diversified compared to the pre-statehood era. Due to a gradual decline in the market demand for canned salmon, there has been a steady increase in the production of fresh and fresh-frozen salmon. Records maintained by the state show that fresh and fresh-frozen salmon currently comprise approximately 65 percent of the total salmon production. Many salmon, herring, and shellfish fisheries have been expanded, and new ones have been developed without compromising conservation requirements. The state has recently adopted regulations and special management guidelines encouraging careful development of shellfish mariculture and new fisheries for sea urchins and sea cucumbers (Pennoyer 1978 p. 24; Holland et al. 1992 pp. 97-100; ADF&G 1992a. p. 24).

Although Seattle remains the financial center for the seafood industry, participation by Alaskan residents in the industry has increased substantially in contrast to the period of federal control when nonresidents dominated all facets of the industry. For example, of the 40,000 employees engaged in fish harvesting and processing combined in 1984, 60 percent were Alaskan residents. Alaska residents purchased 84 percent of all commercial fishing permits in 1986 (Kruse 1988 pp. 10-11).

The sport fish harvest survey indicated 425,025 anglers harvested 3.3 million fish (31 percent sea-run salmon) in 1991. Since 1981, estimated number of anglers fishing in Alaska has increased 39 percent (Mills 1992 pp. 4-6). Although comprehensive studies of eccnomic impacts of sport fishing are lacking, available information indicates that these impacts are substantial and increasing each year. Recent estimates of expenditures associated with sport fishing are only available for Southcentral Alaska and the Juneau area. Angler expenditures in Southcentral Alaska and the Juneau area were approximately $127 million and $14 million, respectively. These expenditures resulted in approximately $72 million in personal income and directly supported 2,360 sport fishing related jobs (Kruse 1988 p. x).

Not only are the fishery resources generally in better condition under state management, the diversified seafood industry is more economically important to a greater number of people. The seafood industry is Alaska's largest private sector employer and, besides oil and gas, provides the greatest contribution of any natural resource to the state's treasury. Alaska's commercial fishery (all species) supports the highest level of production in the United States, over five times that of the next ranked states, and about one-half of the nation's total production. In 1991, commercial fishermen in Alaska were paid $1.3 billion (39% groundfish, 25% salmon, 26% shellfish, 10% others) for their catch, which after processing, provided over $2.5 billion of fishery products at their first wholesale value (ADF&G 1992 a. p. 1).

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COMMERCIAL FISHERIES ANNOUNCEMENT

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January 26, 1995

NEWS RELEASE

PRINCE WILLIAM SOUND HERRING

The projected 1995 herring spawning biomass for Prince William Sound is 19,000 tons. The biological spawning threshold is 22,000 tons. Based on the biomass projection the commercial spring herring fisheries will not open, to conserve the stock for rebuilding.

The herring biomass has declined by over 75 percent from the record biomass in 1992 of over 100,000 tons. This precipitous decline was first observed in the spring of 1993, and low stock abundance continued during 1994.

Several stock assessment methods are used and all indicate that herring are at low abundance.

RECENT PRINCE WILLIAM SOUND HERRING BIOMASS INDICES

	PEAK AERIAL SURVEY (tons)	SPAWN DEPOSITION (tons)	FALL HYDRO-ACOUSTIC (tons)	MILES OF SPAWN
1992	53,845	128,263	NO SURVEY	74.7
1993	20,725	NO SURVEY	20,000	20.4
1994	20,000	17,069	BELOW THRESHOLD	14.6

The spring biomass is expected to be 49 percent age-7 and 24 percent age-5. Given the age structure it is unlikely that there will be an increase in biomass in 1995 unless there is a large recruitment. If significant recruitment does not occur the stock could further decline.

State and Federal agencies and the Prince William Sound Science Center will continue stock monitoring during the spring of 1995. Monitoring projects include aerial surveys, spawn deposition, hydroacoustics, egg incubation and egg loss, avian predation, reproductive impairment and disease.